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DECISIONS OF THE DEPARTMENT OF THE INTERIOR

ESTATE OF GLADYS MARIE BELLMARD (RANDALL, PRESTON, HARRIS) WILSON*

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Decided *December 29, 1978*

Appeal from an administrative law judge's order dismissing probate.

Affirmed and dismissed.

1. Indian Probate: Secretary's Authority: Generally

Proceedings for the determination of a deceased Indian's heirs in a case over which the Department had no jurisdiction must be dismissed.

APPEARANCES: Evelyn Allen, appellant, *pro se.*

OPINION BY CHIEF ADMINISTRATIVE JUDGE WILSON

INTERIOR BOARD OF INDIAN APPEALS

Evelyn Allen, hereinafter referred to as appellant, has appealed Administrative Law Judge Sam E. Taylor's order of Oct. 6, 1978, dismissing probate proceedings involving the above-captioned estate.

Gladys Marie Bellmard (Randall, Preston, Harris) Wilson, hereinafter referred to as the decedent, died Sept. 22, 1976, at the age of 73.

A hearing was duly held and concluded at Pawnee, Okla., on May 19, 1977. Thereafter, on Jan. 27, 1978, Judge Taylor issued an order disapproving will, determining heirs and decreeing distribution.

Thereafter, by letter dated Mar. 6, 1978, the Acting Superintendent, Pawnee Agency, Okla., submitted the original last will and testament of the decedent dated May 1, 1972, which the agency had overlooked in the preparation of the probate file used in the hearing of May 19, 1977. The letter was accepted as a petition for a rehearing by Judge Taylor. Thereafter, the matter was scheduled for rehearing at the Pawnee Agency on May 15, 1978, with all interested parties, including appellant, being advised thereof.

At the rehearing, with appellant and Theodore Roosevelt Bellmard present, the judge advised them that on May 1, 1978, he had received a

*Not in Chronological Order. This is a 1978 decision.

memorandum from Acting Rights Protection Officer David E. Harrison, Bureau of Indian Affairs, Washington, D.C., indicating that all of the decedent's property was unrestricted, the restrictions having been removed on Apr. 7, 1950, by the Department at decedent's request. The judge further advised the parties that he would subsequently issue a dismissal order regarding the proceedings.

From the evidence adduced at the rehearing the judge on Oct. 6, 1978, among other things, revoked and canceled the order disapproving will, determining heirs and decreeing distribution dated Jan. 27, 1978, and dismissed the proceedings for lack of jurisdiction. It is from the foregoing order that the appellant has appealed. In support of her appeal the appellant alleges that decedent was never notified of the removal of restrictions on the property in question; that the Bureau of Indian Affairs failed to carry out the Indian–United States Government Trust Responsibility and that the decedent had always considered the property as restricted and tax exempt. Moreover, the appellant, because of the BIA's alleged negligence in failing to advise the decedent of the removal of restrictions, urges the Office of Hearings and Appeals to handle the probate of the decedent's estate.

An examination of the record, including certified Bureau of Indian Affairs' documents regarding the removal of restrictions on the decedent's property, clearly supports the judge's order dismissing probate.

In view of the actual removal of restrictions by the Department at the decedent's request or application, the allegations given in support of appellant's appeal are to no avail.

[1] Proceedings for the determination of a deceased Indian's heirs in a case over which the Department had no jurisdiction must be dismissed. *Estate of Oh-ste-wattah*, IA–34 (Nov. 7, 1950).

Clearly, the decedent's unrestricted estate falls within the probate jurisdiction of the proper State or Tribal court and not with the Department. Accordingly, the administrative law judge's order of Oct. 6, 1978, should be affirmed and the appeal herein dismissed.

NOW, THEREFORE, by virture of the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the order dismissing probate dated Oct. 6, 1978, issued by Administrative Law Judge Sam E. Taylor is hereby affirmed and the appeal herein is dismissed.

This decision is final for the Department.

ALEXANDER H. WILSON,
Chief Administrative Judge.

I CONCUR:

WM. PHILIP HORTON,
Administrative Judge.

TITLE TO CERTAIN LANDS WITHIN THE BOUNDARIES OF THE FORT YUMA (NOW CALLED QUECHAN) INDIAN RESERVATION

M-36908

January 2, 1979

1. Indian Lands: Ceded Lands—Statutory Construction: Generally

When interpreting Federal agreements and statutes pertaining to Indian Affairs, one must consider the legislative history, as well as surrounding circumstances and subsequent administrative practices to determine what the parties intended, and in particular, what the Indians understood the agreement to mean. Doubtful expressions are to be resolved in the Indians' favor.

2. Indian Lands: Ceded Lands—Statutory Construction: Generally

Congressional intent to modify or abrogate Indian property rights must be clear and cannot be lightly inferred.

3. Act of Aug. 15, 1894—Indian Lands: Ceded Lands

The Agreement of Dec. 4, 1893, between the Yuma (now Quechan) Indians and the United States, ratified in the Act of Aug. 15, 1894 (28 Stat. 286, 332) provided for a conditional cession of the nonirrigable land of the Fort Yuma Reservation. The conditions which included allotment and sale of surplus irrigable land and the opening of nonirrigable lands to settlement and entry, did not occur during the decade following the agreement and ratifying statute.

4. Act of Apr. 21, 1904—Indian Lands: Irrigation—Statutory Construction: Generally

Sec. 25 of the Act of April 21, 1904 (33 Stat. 189, 244), which authorized the application of the 1902 Reclamation Act to the Fort Yuma and Colorado River Reservations, and which provided for the allotment and sale of surplus irrigable lands on those reservations, was unrelated to and was not intended to effect the conditional cession provided for in the 1893 agreement and the 1894 ratifying statute.

This opinion overrules two previous Solicitor's Opinions on the same subject: M-28198 (Jan. 8, 1936), finding, inter alia, that the Indian title to certain lands within the Fort Yuma Indian Reservation has been extinguished; and M-36886, 84 I.D. 1 (1977), Title to Certain Land Within the Boundaries of the Fort Yuma Indian Reservation as Established by the Executive Order of Jan. 9, 1884.

OPINION BY
OFFICE OF THE SOLICITOR

December 20, 1978

To: SECRETARY

FROM: SOLICITOR

SUBJECT: TITLE TO CERTAIN LANDS WITHIN THE BOUNDARIES OF THE FORT YUMA (NOW CALLED QUECHAN) INDIAN RESERVATION

The Quechan Indian Tribe, the Bureau of Indian Affairs,[1] and the

[1] Memo of Nov. 15, 1977, from Acting Assistant Secretary for Indian Affairs to Associate Solicitor for Indian Affairs.

Chairman of the Senate Committee on Interior and Insular Affairs,[2] have requested this Department to reconsider the legal question of whether the Quechan Tribe retains ownership of approximately 25,000 acres of nonirrigable land within the boundaries of their 1884 Executive Order Reservation. This question has been considered on two previous occasions by the Solicitor, resulting in the issuance of opinions in 1936 (M–28198), and 1977 (M–36886, 84 I.D. 1), which have concluded that title to this land was unconditionally ceded to the United States by virtue of a negotiated 1893 cession agreement and an 1894 statute, ratifying such agreement. (28 Stat. 286, 332).

Prior to the issuance of the 1977 Solicitor's Opinion, a draft Solicitor's Opinion to the opposite effect was widely circulated. That Opinion concluded that the 1893 agreement and 1894 ratifying statute provided for a conditional cession of the nonirrigable lands, that the conditions were not fulfilled, and that the cession of the nonirrigable lands had therefore not been effected. Department files on this subject reveal that the draft opinion was seriously considered, and that extensive preparations were made for the issuance of a decision in favor of the tribe. The February 1976 decision by the Solicitor upholding the 1936 opinion was an unexpected event. The Senate Subcommittee on Indian Affairs held hearings in May and June of 1976, to air the controversy and learn the legal basis of the 1976 decision by the Solicitor. In those hearings, the Secretary agreed to direct the Solicitor to prepare a written legal opinion supporting the 1976 decision. A written opinion, M–36886, was published on Jan. 17, 1977.

The sharp and continuing divergence in legal views with respect to this issue have persuaded me that the matter merits reconsideration. Accordingly, I directed review of the Department's files and all previously prepared legal opinions to provide an independent evaluation of the Quechan claim to the 25,000 nonirrigable acres.

Having reviewed that evaluation, I conclude that the 1893 agreement and 1894 ratifying statute provided for a *conditional* cession of the nonirrigable acreage. The conditions articulated in the agreement, which included the allotment and irrigation of irrigable land to the Indians, the sale of surplus to settlers under strictly prescribed conditions, the construction of an irrigation canal, and the opening of nonirrigable lands to settlement, were not met by the United States. No lump sum, or other form of compensation, was provided for the land cession. Allotment and irrigation did not occur on the reservation until Congress passed a 1904 statute (33 Stat. 189) which applied the Reclamation Act to the Ft. Yuma and Colorado River Reservation. The 1904 Act appears to be totally unrelated to the 1893 cession agreement, ex-

[2] Letter of Feb. 8, 1977, from Senator Henry Jackson to Honorable Cecil Andrus, Secretary of the Dept. of the Interior.

cept for mention of it in the legislative history as part of the explanation of the continuing lack of irrigation on the reservation. In short, the conditional cession in 1893 was never effected and the title to the nonirrigable acreage, therefore, remains in the Tribe.

The records of this Department reveals that the nonirrigable lands were administered as tribal lands until the 1936 opinion of Solicitor Margold. *See* footnotes 8 and 9, *infra*, detailing the numerous occassions on which actions were taken by the Department during that period on the basis that these were Indian lands.

In the more than forty years since this Department first ruled that the land in question did not belong to the Quechan Tribe, third parties have acquired various interests such as easements or rights of way. Some of these interests existed prior to the establishment of the reservation, some were granted by Congress and still others were granted by Bureaus in this Department. My recognition of title in the Quechan Indians is subject to these valid third party interests. The Quechan Indian Tribe has previously recognized that their title will be subject to each of these third party interests and also to lands taken by the United States for reclamation purposes.

Background Facts

The Fort Yuma Reservation was created by executive order on Jan. 9, 1884. (1 Kappler, Indian Affairs—Laws and Treaties 832.) In 1893, the Quechan Indians sent a petition to the President and to Congress in which they indicated a willingness to cede their rights in their reservation in return for receiving allotments of irrigated land. (S. Exec. Doc. No. 68, 53rd Cong. 2d Sess. 14–16 (1894)). The Indians expressed belief that they would improve economically if they had smaller, individual units of irrigated land, suitable for farming. In 1893, an agreement was negotiated providing for the allotment of irrigable lands, the sale of surplus irrigable lands under strictly prescribed conditions, the holding of sale proceeds in trust for the tribe and the opening of nonirrrigable acres to settlement under the general land laws of the United States. There was no other provision for a lump sum payment or for any identifiable consideration. The agreement was ratified by Congress in 1894 (28 Stat. 286, 332). The ratifying act further provided that construction of an irrigation canal (the right-of-way for which had been granted in an 1893 statute) would have to be commenced within 3 years of the date of passage of the act or the right-of-way would be forfeited. In addition, each adult male was to receive free water for 1 acre of his allotment over a 10-year period.

During the following decade, allotment did not occur, the President did not proclaim the nonirrigable

lands a part of the public domain and open to settlement, and the irrigation canal was not built. Then, on June 17, 1902, Congress passed the Reclamation Act (32 Stat. 388). In 1904, mindful of the continuing and unsatisfied need for irrigation on both the Fort Yuma and Colorado River Reservations, Congress passed an Indian Appropriations Act which extended the benefits of the 1902 Reclamation Act to those two reservations, and which provided for the allotment of irrigable land to tribal members and for the sale of surplus irrigable lands to non-Indians (Act of Apr. 21, 1904, 33 Stat. 189, 224). The terms under the 1904 Act for the sale of surplus lands and for holding of proceeds differed significantly from those in 1893 agreement and 1894 ratifying act. The 1904 Act was amended in 1911 to increase the allotments to 10 acres. (36 Stat. 1059, 1063.) Allotment of irrigable lands was completed by 1912. The irrigable lands were fully disposed of by 1949. The 25,000 nonirrigable acres were not returned to the public domain, opened to settlement and disposed of. They are the subject of this opinion. While the majority of these lands continue to be nonirrigable, it is estimated that between 5,000 and 5,500 acres, the bulk of which are in California, are "practicably" irrigable.

Legal Analysis—1893 Agreement and 1894 Statute

The resolution of the title question turns, I believe, on the correct interpretation of the 1893 agreement and the ratifying statute. Case law establishes that when interpeting Federal agreements and statutes pertaining to Indian Affairs, one must consider the legislative history, as well as surrounding circumstances and subsequent administrative practices, to determine what the parties intended, and in particular, what the Indians understood the agreement to mean. In so doing, doubtful expressions are to be resolved in the Indians' favor. [3] Clearly, such interpretative approach is appropriate in a case such as this where the trustee is examining and interpreting a transaction involving valuable assets of its ward, and in which the trustee is the other party to the transaction, who stands to gain from the disposition of the assets other than to the tribe. As stated in the case of *Navajo Tribe of Indians* v. *United States*, 364 F. 2d 320, 322, 323 (Ct. Cl. 1966):

> Since the Department of the Interior had an obligation to safeguard the property of the Navajos when they were dealing with third parties, it is clear that an even greater duty existed when the Department itself entered into transactions with the Indians. * * * Because of

[3] *Menominee Tribe* v. *United States*, 391 U.S. 404 (1968); *United States* v. *Santa Fe Pacific R. Co.*, 314 U.S. 339 (1941); *Antoine* v. *Washington*, 420 U.S. 194 (1975), *Rosebud Sioux Tribe* v. *Kneip*, 430 U.S. 584 (1977). The conclusions of this opinion flow from premises which differ from those in the 1936 and 1977 opinions in two fundamental respects: (a) a finding that the documents, rather than being clear, contain ambiguities in critical areas; and (b) canons of construction applied here are those which are uniquely applicable to controversies involving Indian rights as opposed to those which may apply to controversies generally.

this and because of the Government's special duty toward the Indians, the various dealings must be carefully scrutinized. * * *

Neither the agreement nor the ratifying statute is sufficiently clear with regards to the cession of the nonirrigable lands to compel one interpretation over another. The actual language of the cession Article is:

> Article I. The said Yuma Indians, *upon the conditions hereinafter expressed,* do hereby surrender and relinquish to the United States all their right, title, claim, and interest in and to and over the following described tract of country in San Diego, California, established by executive order of January 9, 1884, which describes its boundaries as follows * * * . (*Italics added.*)

The remaining articles of the agreement provide for the allotment of irrigable lands to Indians, the sale of surplus irrigable lands to settlers, the manner in which such sale was to be conducted and proceeds thereof handled, the issuing of trust patents and the opening of lands, not subject to irrigation, to settlement.

In Article I, there is an apparent conflict of meaning, with regard to timing of the cession, between the phrase, "*upon* the conditions hereinafter expressed" and the phrase, "do *hereby* surrender and relinquish." Also, the remainder of the agreement does not list conditions or governmental duties, describing them as such; this makes it difficult to discern from the face of the document, which of the Articles contain conditions or compensation which might affect the relinquishment. Article VI, the only article specifically relating to the nonirrigable lands, merely provides for the future opening of such lands to settlement—suggesting a cession in trust, *i.e.*, a cession solely for purposes of permitting the United States to act as broker with respect to those lands. *See Ash Sheep Co.* v. *United States*, 252 U.S. 159 (1920). The corresponding provision in the ratifying statute provides that the nonirrigable lands *shall* become a part of the public domain, and *shall* be opened to settlement by *Presidential proclamation.* The language is in the *future* tense and requires executive action. Lastly, while the Article providing for the sale of irrigable lands provides for holding proceeds for the tribe, there is no corresponding arrangement expressed regarding the sale of nonirrigable lands. This raises the question of whether the same arrangement was intended, or understood, for the nonirrigable lands.

Under these circumstances the language is not clear and unambiguous on its face. It is not clear to me, from the cited language, that the Indians immediately ceded title to all their reservation lands, for no money whatsoever, and without actual performance of certain acts by the U.S. Government.

Because the language of the agreement and statute is not clear,

it is necessary to resort to rules of interpretation. I am aware of the general principles of contract law which favor the construction of provisions of contracts as promises rather than conditions, 3A A. Corbin, *Contracts*, § 635 (rev. ed. 1960); 5 S. Williston, *A Treatise on the Law of Contracts*, § 665 (W.H.E. Jaeger ed. 1961), and the general principles of real estate law which favor covenants over conditions. *See* 2 R. Powell, *The Law of Real Property*, §§ 187, 188 (1974); cf. I *American Law of Property*, § 2.8 (1952); 5 id. § 21.3 (a). Technical rules of conveyance should not be applied in the construction of agreements between the Indians and the Government. *Choctaw Nation* v. *Oklahoma*, 397 U.S. 620 (1970). Rather, as noted above, the focal point of such construction is the intent of the parties. Thus, when construing another cession agreement containing conditional language, the Supreme Court examined legislative history, contemporary statements by tribal members, actual benefits delivered to the tribe (*i.e.*, lump sum payment) and subsequent treatment of the lands. *DeCoteau* v. *District County Court*, 420 U.S. 425 (1975). In finding that an immediate cession was effected, in spite of seemingly conditional language, the Supreme Court relied heavily on the facts that a sum certain was paid for the lands and that there was no evidence that the lands were subsequently administered as Indian lands. (*DeCoteau*, *supra* at 448). Furthermore, the Court examined numerous contemporaneous accounts of the cession, which showed that at least some Indians believed they had sold their land.

The background information in this case is quite different from that in *DeCoteau*. The legislative history indicates that the main purpose of the Agreement—from the standpoint of the Indians who signed it,[4] and the Congress that ratified it [5]—was to provide irrigation to the reservation. Indeed, in the 1894 statute, Congress added statutory provisions concerning the construction of a canal requiring that it be commenced within 3 years or the right of way previously granted would be forfeited. The Indians perceived

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[4] In a post-Agreement letter from the Indians to the President and Congress, the Tribe explained why they were willing to cede their lands:

"We believe if furnished with a small tract of land, *with water to irrigate it* and with the means of cultivating, we could improve our fortunes to the extent of securing at least all the necessaries of life. We believe if the land now embraced in our reservation could be thrown open to settlement an irrigating ditch would be built through the reservation. * * * *While with water the soil is fertile, nothing will grow without irrigation*, for there is no rain. Hence we want the ditch built so that we can get water and have early and large crops like our white friends. We are willing to give up a large part of our reservation because as it is it is worthless to us, *if* we can have small tracts set apart for our use."

(Italics added).

53rd Congress, 2d Session, Senate Ex. Doc. 68 at 14–15.

[5] The paramount reason for the proposed Agreement is found in the proposition of the Colorado River Irrigating Co. to furnish the Yuma Indians with water for irrigation purposes. 53rd Congress, 2d Session, House Report No. 1145, at 2. See also Senate Ex. Doc. 68, *supra*. Later legislative history affirms this view of the 1894 Act. 58th Congress, 2d Session, Senate Report 1660.

farming irrigated allotments as the key to achieving their goal of economic improvement and they offered to cede their reservation in return for irrigated allotments, perhaps believing they had to do so to entice Government action (since the negotiation of cession-allotment agreements was a prevailing practice at that time). There is no evidence that obtaining money as the desired compensation was considered by the Indians.

Evidence of either the Government's or the tribe's intent regarding the nonirrigable lands is inconclusive. There is nothing to suggest that the Government wanted to acquire the nonirrigable lands. In the negotiated agreement, the Government did not specify any compensation for the nonirrigable lands, whereas it did clearly provide compensation for any irrigable lands that would be removed from Indian ownership. This is a particularly troublesome point because the cession agreement was negotiated pursuant to the General Allotment Act which authorized the Government to negotiate for the cession of surplus Indian lands, *upon just* and *equitable* terms. (Act of Feb. 8, 1887, 24 Stat. 389, § 5, 25 U.S.C. § 348 (1976). This failure of compensation for the nonirrigable lands seems a crucial "oversight" of the agreement.

To be sure, Congress could have simply taken the nonirrigable lands under Article VI of the Agreement with no compensation.[6] However, evidence of such intent is not obvious. First, the Government had proceeded by agreement with the Indians. Secondly, the Agreement and statute were intended to implement the General Allotment Act, which authorized the Secretary to negotiate with Indians for the cession of their lands only under such terms as were "just and equitable." Congress and the Department, it seems, were acting more in their guardianship capacity,[7] and not in a confiscatory manner.

There is, moreover, nothing in the history of that time indicating that the Government had any particular interest in acquiring the lands in question. By contrast, in the case of the cession agreement construed in the *DeCoteau* case, *supra*, there was evidence of strong pressure by non-Indian settlers on the Government to acquire particular Indian lands so that the settlers could move in. Not only is evidence of such pressure totally lacking in this case, but the Government's failure to ever open the land to settlement strength-

[6] The courts have held that Congress (or the executive, for that matter) *could* constitutionally take the land of an executive order reservation even without providing the tribe any compensation. *Sioux Tribe* v. *United States*, 316 U.S. 317 (1942); *Hynes* v. *Grimes Packing Co.*, 337 U.S. 86, 103–104 (1949). The result of these cases, however, was not clearly anticipated in 1904. *Cf.* 34 Op. A.G. 181 (1924); William F. Tucker, 13 L.D. 628 (1891); C. N. Cotton, 12 L.D. 205 (1890).

[7] *Shoshone Tribe* v. *United States*, 299 U.S. 476 (1937); *United States* v. *Creek Nation*, 295 U.S. 103, 109–110 (1935); *Lane* v. *Pueblo of Santa Rosa*, 249, U.S. 110, 113 (1919); *United States* v. *Lynah*, 188 U.S. 445, 462 (1903).

ens the impression that no one was very interested in, much less had specific designs on, the land.

There is a similar lack of evidence as to how the Indians understood the agreement to affect the status of the nonirrigable lands. It must be remembered that Article VI of the agreement did not refer to the cession or sale of nonirrigable lands, nor did it state they were returned to the public domain. It merely stated they would be opened to settlement. One might assume that because the Indians expressed interest in farming irrigated land, that the Indians were as disinterested in the nonirrigable land as was the Government. But, whether the Indians understood that they had casually given away such land, without any apparent compensation, and without retaining any interest therein, is a further assumption for which there is simply no evidence and, therefore, which we are not justified in making. Belief that non-Indian settlement on such lands to be a benefit to the Indians and, therefore, a condition of, or compensation for the cession of such lands, in strict technical sense, a possible theory supporting an immediate cession. However, it is not clear that these Indians—who were not versed in either the English language or such a sophisticated concept—understood that they would be giving up valuable real estate in exchange for the "privilege" of having non-Indian settlers as neighbors on their reservations.

In addition to the lack of payment, and the lack of evidence that the parties intended the transfer of the nonirrigable lands, this case differs sharply from that in *DeCoteau* and in *Rosebud Sioux Tribe*, *supra*, in that the Department of Indian Affairs continued to administer the nonirrigable lands in trust for the tribe in the granting of leases and permits and in holding rents in trust for the tribe.

The results of an intensive file review, conducted in 1975 by staff of the Solicitor's Office and detailed below, show a clear and basically consistent history of administration of the nonirrigable lands by the Bureau of Indian Affairs prior to the 1936 Solicitor's Opinion. This administrative history was acknowledged in the 1936 Opinion. Maps of the area issued between 1894 and 1936 include the Fort Yuma Indian Reservation and depict its boundaries as declared in the 1884 Executive Order.[8] The

[8] *E.g.*, U.S.G.S. map, "Colorado River from Black Canyon, Ariz.–Nev. to Arizona–Sonora Boundary," surveyed in 1902 and 1903 (Exhibit RO–13, *Quechan Tribe* v. *United States*, Indian Claims Commission Docket No. 320 [hereinafter cited as Claims Exhibit——]); U.S.G.S. map "Yuma Quadrangle, California–Arizona," ed. of Apr. 1905 (BIA Files, Phoenix); 1936 reprint of Apr. 1905 U.S.G.S. map (Claims Exhibit RO–13); U.S. Reclamation Service maps of the Yuma Project in its annual reports to Congress (*e.g.*, Third Annual Report: 1903–04, at 192–193 (2d ed. 1905); Fifth annual Report: 1906, at 100–01 (1907)); U.S. Reclamation Service Map No. 16774 (Jan. 1916) (Yuma Project File 154–D, A610158; File 154, "Lands–General," A609223); U.S. Reclamation Service Map No. 17471 (1917) (Yuma Project File 154, "Lands–General," A609224, 2–328). The latter two maps, which were produced after issuance of the Indian trust allotment patents on Feb. 5, 1914, show the Indian Allotments (or Indian Unit) and continue to depict the entire area encompassed by the 1884 Executive Order as the Yuma Indian Reservation. The field notes, reports and official plat of survey prepared by General Land Office Surveyor

Bureau of Land Management's plat records, as well as the original documents signed at the Secretarial level, show that all rights of way issued by the Department across the nonirrigable lands (except those which may have been issued by the Bureau of Reclamation within its own rights of way) were issued under statutory authority pertaining to Indian reservations.[9]

The Commissioner of Indian Affairs issued trader's licenses to occupy and use nonirrigable land on the reservation, near the western boundary until the issuance of the

F.N. 8—Continued
John L. Warboys between 1931 and 1934, as well as the underlying assignment instructions (Special Instructions Group 264, Calif.) repeatedly refer to, affirm and adopt the "West Boundary of the Yuma Indian Reservation" as described in the 1884 Executive Order and fixed by the Ingalls survey in 1895; and General Land Office Special Instructions Group 281, relating to T. 16 S., R. 23 E., S.B.M., dated Apr. 15, 1932, refers to "that portion of the Yuma Indian Reservation lying between the Reclamation Levee and the abandoned channel of the Colorado River" (Claims Exhibit RO–13 and supporting documents). Additional maps recognizing the continued existence of the reservation as described in the 1884 Executive Order are listed in note 9 *infra*.

[9] "Map of the Definite Location of the Southern Pacific Railroad in the Yuma Indian Reservation, Calif.," G.L.O. no. 506131–1915, surveyed Dec. 1906, submitted to the Indian Agent, Yuma Indian Reservation, Mar. 13, 1907, and approved by Acting Secretary of the Interior George W. Woodruff on June 18, 1907, subject to the provisions of the Act of Mar. 2, 1899 (30 Stat. 990, *as amended*, 25 U.S.C. §§ 312–18 (1976)) (BIA Files, Phoenix) (the BLM plat records for sec. 36, T. 16 S., R. 22 E., Record issuance of another right-of-way to the railroad under the 1899 Act, with jurisdiction in the BIA on July 29, 1926 (R. 1359, S 3492)); "Map of the Definite Location of the Inter Calif. Ry. in Yuma Indian Reservation, Calif.," received by Superintendent Egan, Yuma Indian Reservation, Sept. 30, 1909, and approved by the Department Feb. 10, 1910, under the Act of Mar. 2, 1899, with the schedule of compensation to the Indians required by that act being approved by First Assistant Secretary Frank Pierce on May 14, 1910, pursuant to the recommendation of Superintendent Egan and Commissioner of Indian Affairs Valentine (BIA Files, Phoenix); "Proposed Telephone and Telegraph Line Crossing the Yuma Indian Reservation," Pacific Telephone and Telegraph Co., Right of Way Map LA 011977, approved by First Assistant Secretary of the Interior A. A. Jones on July 3, 1913, pursuant to the Act of Mar. 4, 1911 (36 Stat. 1253, *as amended*, 43 U.S.C. § 961 (1970)), with the requisite finding for Indian reservation lands of compatibility with the public interest being made by the First Assistant Secretary by notation on the July 2, 1913, memorandum from the Second Assistant Commissioner of Indian Affairs to the Secretary recommending approval, and with rental, payable to the account of the Quechan Tribe, being set at $8.66 for the first year (Claims Exhibit RO–3) (related documents show the rental fee was collected on behalf of the Tribe for the full 50 year term of the right of way); "Center Line Location Map of Proposed Highline Canal from Laguna Dam to Imperial Valley and Location of Power Plant," dated June, 1915, showing the reservation boundaries as established in 1884, submitted for the approval of the Secretary of the Interior pursuant to secs. 18–21 of the Act of Mar. 3, 1891 (26 Stat. 1095, 1101–02, *as amended*, 43 U.S.C. §§ 946–49 (1970)), sec. 2 of the Act of May 11, 1898 (30 Stat. 404, *as amended*, 43 U.S.C. § 951), and the Act of Feb. 15, 1901 (31 Stat. 790, *as amended*, 43 U.S.C. § 959 (1970)), all of which authorize rights of way through Indian reservations as well as public lands (BIA Files, Phoenix—no indication as to whether the right of way was approved); Memorandum dated June 6, 1917, from Assistant Commissioner of Indian Affairs Meritt to Commissioner Tallman of the General Land Office, responding to the latter's request for a report on the application of the Coachella Valley Ice and Electric Co. for a right of way for an electrical transmission line across Yuma Indian lands (all in the nonirrigable western portion of the 1884 reservation), advising that "the proposed right of way involves no Indian allotments but crosses a portion of the Yuma Indian Reservation which is absolutely waste desert land and upon which no Indians reside," and recommending approval of the application with an annual charge of $5 per mile as compensation for damage to the Yuma Indian Reservation lands involved (BIA Files, Phoenix); "Proposed State Highway Through Yuma Indian Reservation," Calif. Highway Commission, dated July 16, 1923, *as amended* by maps of changes "A" through "D", dated Sept. 28, 1923, through May 1924, approved

(Continued)

1936 Solicitor's Opinion.[10] Sand and gravel leases were issued by the Bureau of Indian Affairs on tribal unallotted lands within the Yuma Indian Reservation from at least 1929 to 1936 pursuant to sec. 26 of the Act of June 30, 1919 (41 Stat. 3, 31, *as amended*, 25 U.S.C. § 399 (1976)). The tracts which were described were all nonirrigable lands in the western portion of the reservation.[11]

F.N. 9—Continued
by Assistant Secretary of the Interior John H. Edwards on Oct. 10, 1927, subject to the provisions of the Act of Mar. 3, 1901 (31 Stat. 1058, 1084, 25 U.S.C. § 311 (1976)), and amending the right of way as originally approved under the same act on Nov. 9, 1917 (Claims Exhibit RO–8; BLM Plat Records, Sacramento): Order of withdrawal and reservation of a right of way for a proposed Reclamation Service "power canal from siphon drop to Araz" across the Yuma Indian Reservation, withdrawing and reserving 236.05 acres of reservation land, of which approximately 3.5 acres were allotted lands, recommended by Director and Chief Engineer Davis of the U.S. Reclamation Service on Apr. 15, 1918, concurred in by Assistant Commissioner of Indian Affairs Meritt on the "understanding that adequate compensation be assessed and paid for damage to Indian lands involved," concurred in by Commissioner Tallman of the General Land Office, and approved on June 17, 1918, by Assistant Secretary of the Interior S. G. Hopkins under secs. 13 and 14 of the Act of June 25, 1910 (36 Stat. 855, 858, 43 U.S.C. § 148 (1970), 25 U.S.C. § 352 (1976)) (Yuma Project File 150, "Purchase of Lands–General, 1909 thru June 1919," A606156, A606163, A606167–68); "Southern Pacific Railroad Station Grounds" map received by the Superintendent of the Yuma Indian Reservation June 30, 1928, and approved by the Department on Dec. 18, 1928, pursuant to the Act of Mar. 2, 1899, *supra* (Claims Exhibit RO–11; BLM Plat Records, Sacramento). The Bureau of Land Management plat records in Sacramento, Calif., show three additional rights of way issued under statutes governing Indian reservation lands and noted as being under the jurisdiction of the Bureau of Indian Affairs; a highway right of way, R 2704, issued Oct. 24, 1930, under the Act of Mar. 3, 1901, *supra*, a telephone and telegraph line right of way, S 3489, issued June 14, 1927, under the Act of Mar. 3, 1901, *supra*, and a transmission and telephone right of way, LA 040525, issued Mar. 23, 1927, under the Act of Feb. 15, 1901, *supra*.

[10] Trader's License covering 80 acres in the N/2 of the NW/2, sec. 25, T. 16 S., R. 21 E., S.B.M., issued to Robert M. Goebel Jan. 1, 1928, to James H. Maxey Aug. 6, 1929, and thereafter to Maxey and later his widow, Mary A. Maxey, through various renewals (BIA Files, Phoenix).

[11] Letter dated June 18, 1935, from the Commissioner of Indian Affairs to Superintendent Jolley, Fort Yuma Agency; Letters dated Dec. 13, 1939, and Apr. 6, 1943, from Superintendent Gensler, Colorado River Indian Agency, to the United States Fidelity and Guarantee Co.; Letter dated Mar. 29, 1943, from BIA Field Agent Cox, Fort Yuma Sub-Agency, to Superintendent Gensler; Letter dated Nov. 18, 1934, from H. L. Gardner to the Quechan Tribal Council; Letter dated Aug. 3, 1934, from H. L. Gardner to Superintendent Jolley, Fort Yuma Indian Agency; Notices of location of placer mining claims by Rosa Lee Black and Patsy Black on Feb. 26, 1935, filed with the Fort Yuma Indian Agency on Mar. 18 and Apr. 2, 1935, within 60 days of location as required by the 1919 Act (BIA Files, Phoenix, Claims Exhibits RO–4, RO–12, RO–15).

There is no record of management of the nonirrigable areas by the Bureau of Land Management prior to 1936. Only one document even hints at such management by the Bureau of Reclamation. On Oct. 28, 1953, an "Analysis of G.L. Account 271.22—Rental of Farming and Grazing Lands" was prepared to ascertain the portion of "Miscellaneous Non-operating Income—Other" attributable to the rental of grazing and farming lands covered into such account between 1910 and 1953. The entries are jumbled and clearly inaccurate in places. The covering memorandum states that "some of the income * * * was from Mining and Gravel Leases, and still a larger portion from lands lying outside both irrigation divisions. Probably all of the Mining and Gravel leases, as well as a sizeable portion of the Grazing and Farming leases, lie outside the two irrigation divisions." An inspection of the entries confirms that all of the leases listed in the "Gravel and Mining" column were on nonirrigable reservation lands, except perhaps Lease I24r—358 issued to Emil Frank. But all of them are entered in the ledgers *after 1940*, and most, if not all of them, are almost surely the same sand and gravel leases that were administered by the Bureau of Indian Affairs prior to 1936. See, *e.g.*, leases I24r–417 and I24r–504 issued to H. L. Gardner and the leases issued to C. H. Trigg and Emil Frank and compare them with the BIA leases issued to the same persons as described in the documents referred to in the preceding paragraph of this note. Similarly, all the leases except for one listed in the "Outside Area" column, although covering nonirrigable portions of the reservation, were entered in the ledgers after 1936. See, *e.g.*, lease I24r–415 issued to Mary E. Maxey for a gas station and lease I24r–456 issued to Callahan Construction Co. for a "Piece of

In addition to this formal evidence of administration, there are many informal recognitions of the continued inclusion of the nonirrigable lands within the Indian reservation. Both the Commissioner of Indian Affairs and the Director of the Reclamation Service described the Yuma Project as encompassing only "the *bottom lands* in the Yuma Indian Reservation," [12] and the chief officers of the two bureaus repeatedly referred to the nonirrigable lands as "Indian country within the meaning of the law," [13] "Indians lands * * * [which] are not public lands in the ordinary sense of the word," [14] and lands the disposal of which "is primarily

F.N. 11—Continued
Ground at Pot Holes" (a site in sec. 25, T. 15 S., R. 23 E.). The Mary E. Maxey lease, inaccurately placed in T. 15 S. rather than T. 16 S. of R. 21 E., is undoubtedly a lease for the same ground that was utilized by Mrs. Maxey under a BIA trader's license prior to 1936. See the documents referred to in note 10 *supra*. The one exception is lease L–30 issued to R. E. Whitmore and S. H. Flood and listed as an "Outside Area" between 1918 and 1924. However, the land description (sec. 19, T. 16 S., R. 23 E. and sec. 35, T. 15 S., R. 23 E.) includes both irrigable and nonirrigable lands, and the lease is actually listed (under Whitmore's name) for the period from 1925 to 1927 and again in 1928 in the "Reservation" Division column, which covers the irrigable lands in the Reservation Division of the Yuma Project. The "Outside Area" listing was therefore, probably an error. The term "Reservation Division" described the irrigable lands and project works of the Yuma Project on the California side of the Colorado River, as several of the maps referred to in note 8 *supra* indicate. It did *not* cover the nonirrigable reservation lands not used for project works. Hence the use of the "Outside Area" column in the account analysis. A study of all of the entries in the "Reservation [Division]" column shows that all of them included irrigable as well as nonirrigable lands, and the leases were no doubt for a portion of the irrigable lands. The land descriptions in the analysis ordinarily give at most the section in which the lease was contained, without providing any more precise description. Where more precise descriptions are given, they refer to specific lots or farming units in the Bard area opened to non-Indian settlement in 1910. See, *e.g.*, leases I1r–372, L–14, and 4–11. Other leases are in sections which are entirely, or practically entirely, irrigable. See, *e.g.*, leases I24r–202, I24r–305, I24r–307, I24r–354. Leases I24r–409 was for a "track on levee in Cal. in Res. Div." One lease whose land description defies accurate interpretation is the lease originally issued to E. F. Sanguinetti under lease number I24r–169 and described as secs. 31, 36, 1, 6 in townships 15, 15, 16 and ranges 23, 22E. It is not clear which sections are to be matched with which townships and which ranges. Some of the probable combinations would include sections which contain only nonirrigable lands, but all of these would also contain substantial project works, except for sec. 6, T. 16 S., R. 22 E., which is high up in the rocky mesa and useless for farming or grazing. Considered as a whole, however, the account analysis supports BIA jurisdiction over the nonirrigable lands prior to 1936.

[12] Fifth Annual Report of the Reclamation Service: 1906, at 100 (1907) (italics added); Letter dated Feb. 28, 1906, from the Commissioner of Indian Affairs to the Secretary of the Interior (Yuma Project File 154–A, "Indian Lands," A609694). A letter dated July 18, 1913, from Reclamation Service Yuma Project Engineer Sellew to supervising engineer Hill enclosed three prints of a map showing "the entire Indian Reservation," including as one subdivision thereof "the area allotted to the Indians, amounting to about 8,200 acres" (Yuma Project File 154–A, "Indian Lands, 1910 thru June 1919," A609380, A609382–84).

[13] Letter dated Oct. 1905, from Acting Commissioner of Indian Affairs Larabee to the Director, U.S. Geological Survey (in which the Reclamation Service was originally located), concerning police jurisdiction over the nonirrigable lands on the California side of the Colorado River being used for construction of the Laguna Dam (Yuma Project File 154–A, "Indian Lands," A609664–65).

[14] Copy of memorandum dated Mar. 21, 1925, from Acting Chief Engineer Crowe, Bureau of Reclamation, to the Commissioner of Reclamation, concerning an application by Southern Sierras Power Co. for a right of way "west of the east line of Sec. 19, T. 16 S., R. 22 E., S.B.M.," which would be "across Indian lands over which the Bureau of Reclamation has proposed to construct certain works in connection with the All-American Canal to Imperial Valley." (Yuma Project File 430, "Acquisition of Lands, Indian Lands thru 1929").

within the control of the Indian Office." [15]

More particularly, the nonirrigable lands between the reservation levee and the Colorado River are expressly recognized as being reservation lands subject to the jurisdiction of the Indian Bureau, except insofar as such lands were necessary for the protection of the levee. In a letter dated May 28, 1906, District Engineer Homer Hamlin advised the Director of the U.S. Reclamation Service that "[t]he jurisdiction over this land will probably always remain with the Indian Bureau, as it will not be reclaimed or sold as a part of the cultivable area of the Yuma Project." [16] In 1907, Superintendent Deaver of the Yuma Reservation raised the question of the status of these lands, as well as the "27000 acres of rough mesa and mountainous land unfit for agricultural purposes," in light of the failure of Congress, in the Act of Apr. 21, 1904 (33 Stat. 189), to "provide for the disposition of the balance of the reservation that is not irrigable." [17] The Secretary of the Interior directed Special Inspector Levi Chubbuck of the U.S. Indian Inspection Service to investigate and report on this and other matters. On Apr. 6, 1907, Inspector Chubbuck reported to the Secretary, suggesting that the strip of land between the levee and the river "be formally reserved by the Indian Office" and that a parallel strip inside the levee which was not to be allotted to Indians or disposed of to non-Indians, as well as "other available places on the Yuma Reservation," be planted with fruit bearing trees, "subject to such regulations as the Reclamation Service desires to impose for the protection of the levees and ditches, the Indians' rights to the income from the products being recognized, in consideration of the fact that the reservation as a whole is theirs." [18] In 1919, the Director of the Reclamation Service implicitly recognized the right of the Indian Office to irrigate "some lands in Sec. 25, T. 16 S., R. 22 E., which lie outside of our levee and consequently are not included within the proposed Yuma project." [19] And in a letter dated Oct. 20, 1929, the General Land Office advised the Commissioner of Indian Affairs that:

> It is the opinion of this office that the reservation boundary is defined by the center of the abandoned channel [as it existed prior to the avulsive change of 1920] * * *. The area between the levee and the abandoned channel, constituting the present Yuma Indian Reservation boundary, appears therefore to be still in public ownership and a part of the Indian Reservation.

[15] Letter dated June 23, 1914, from Director Newell, Reclamation Service, to U.S. Representative Carl Hayden (Yuma Project File 154–A, "Indian Lands, 1910 thru June 1919," A609414).

[16] Yuma Project File 154–A, "Indian Lands," A609709–11. See *id.* A609702–13 for related Secretarial level correspondence.

[17] Letter dated Apr. 11, 1907, from Superintendent Deaver, Yuma Reservation, to the Commissioner of Indian Affairs, referred by the latter to the Director of the Reclamation Service on May 7, 1907 (Yuma Project File 154–A, "Indian Lands," A609721–28).

[18] Yuma Project File 154–A, "Indian Lands," A609734–39.

[19] Letter dated Oct. 2, 1919, from Director Davis, U.S. Reclamation Service, to the Commissioner of Indian Affairs (Yuma Project File 150, "Acquisition of Lands, Southern Pacific Ry. Co.").

In fact, the jurisdiction of the Bureau of Indian Affairs over the nonirrigable lands of the 1884 reservation was not challenged, insofar as the available documents show, until July 15, 1935, during the final stages of approval of the right of way for the All-American Canal. The canal was originally proposed as a private project, passing through the 1884 reservation from the southwest corner to the northeast corner, crossing allotted and unallotted Indian lands, mostly the latter. The entire right of way route was considered to be within the reservation, so that compensation would have to be paid to the Indians for both the allotted and unallotted lands.[20] When the Reclamation Service decided to construct the canal itself, it shifted the right of way slightly north so that only tribal lands would be involved, and, in a letter dated June 27, 1934, requested the General Land Office to submit the proposed right of way for the canal, which would involve no Indian allotments but rather "exceedingly rough territory along the edge of the Yuma mesa," to the Secretary of the Interior "(through the Commissioner of Indian Affairs) for approval under Sec. 13 of the Act approved June 25, 1910 (36 Stat. 855, 858, 43 U.S.C. § 148 (1970))," an Act applying to "lands within any Indian reservation," and hence, as the Commissioner of the General Land Office noted in his transmittal letter to the Commissioner of Indian Affairs dated July 5, 1934, administered by the Office of Indian Affairs. The Commissioner of the General Land Office also stated that "the right of way involves Indian lands." [21] The Reclamation Service's reversal of position in 1935 seems to have been prompted by its receipt of a report dated Mar. 12, 1935, making substantial claims for compensation and consideration on behalf of the Quechan Indians.[22] The resulting dispute led to the 1936 Solicitor's Opinion.

Although Congress did not deal with these lands between 1894 and 1936 in any manner which would reveal its understanding of their status, there is a statement in the Congressional Record [23] by Representative Stephens of Texas on Dec. 6, 1912, approximately two years after Congress enlarged the allotments to 10 acres, and near the time when the canal constructed through the reservation was completed, implying that the "large amount of land up on the mesa" (that is, most of the "nonirrigable" lands which are affected by this Opinion) was in Indian ownership at that time. And, during hearings in San Diego,

[20] *See, e.g.*, "Right of Way Plats of the All American Canal through Tribal and Allotted Indian Lands of the Yuma Indian Reservation," dated Jan. 1928; "Schedule of Appraisements Covering Right-of-Way Across Yuma Indian Reservation, Etc.," covering unallotted lands therein, signed Apr. 27, 1928 (Claims Exhibits RO–7, RO–10).

[21] Claims Exhibit RO–7. See in addition the Bureau of Reclamation document cited in note 14 *supra*.

[22] *Id.*

[23] 49 Cong. Rec. 748.

Calif., on June 29, 1934, Chairman Wheeler of the Senate Committee on Indian Affairs referred to "the All-American Canal constructed in connection with the Boulder Dam project and running across the lands of the Indians down there [in the Yuma Indian Reservation]" and told John Curran, a Yuma Indian concerned about compensation for the right of way, "They will have to pay you for it, if they take your land." [24]

Solicitor Austin's 1977 Opinion devotes much effort to establishing that the Department's administrative practices with respect to these lands were inconsistent at best. After carefully reviewing his discussion, it seems clear that the isolated deviations do not alter the fact that this Department treated the nonirrigable acreage as belonging to the Indians.

An example of why the 1977 analysis of administrative practices is unpersuasive can be found on p. 29 of that Opinion where Solicitor Austin quotes a 1903 letter from the Commissioner of Indian Affairs on the subject of the nonirrigable lands. The quoted language, however, is taken somewhat out of context as can be seen from the remainder of the Commissioner's discussion which is found in footnote 16. Taken as a whole, the Commissioner's statement does not offer strong support for the proposition that the nonirrigable lands had been ceded. Secondly, Solicitor Austin cited a series of letters by government officials, giving their opinion of the effect of the 1893 agreement. However, such statements appear to me to be more in the nature of gratuitous comments, rather than researched legal opinions, and they do not deal with the *essential issue* of how the lands were administered. In fact, the comments quoted appear to be confused on the point of whether the nonirrigable lands were public domain lands. And, as Solicitor Austin then stated on p. 31 of the 1977 opinion:

> * * * there is a great deal of administrative material that indicates that the subject of non-irrigable lands were administered as Indian lands or were, at least, considered to be a part of the Yuma Reservation subsequent to 1894. In some cases, it will be noted that some of the same officers who determined that the Indians had ceded the subject lands also dealt with administrative details pertaining to those lands as though they were Indian lands.

Thirdly, the 1977 Opinion relies strongly on the Warboys' survey in 1928 as evidence of the Government's view of the current reservation boundaries. However, it has been pointed out that the surveyor's notes [25] indicate that the surveyor was not instructed to or attempting to define the reservation boundaries, as affected by the cession agreement. Moreover, Warboys' comment, cited by Solicitor Austin, only dealt with the status of *irrigable* lands and not of the nonirrigable lands. Therefore, the survey does little to per-

[24] *Survey of Conditions of the Indians in the United States, Hearings before a Subc. of the Senate Comm. on Indian Affairs*, pt. 33, 73d Cong., 1st Sess. 17245 (1935). See *id.*, pt. 2, 70th Cong., 2d Sess. 628–29 (1929) (reference to lease of Quechan tribal lands).

[25] Field Notes of Survey executed by John L. Warboys, under Special Instructions of May 14, 1928, Group No. 152.

suade one that it reflected the Government's view of the continuing status of the nonirrigable lands. A last example of the unpersuasive line of argument taken to discredit evidence of administrative practices is the statement that the cession of the nonirrigable lands was not entered on the tract books until the 1960's which may explain why the lands were administered as Indian lands. The nonentry in the tract books does more to suggest that the Government did not consider the nonirrigable lands ceded than it does to diminish the impact of administrative treatment as tribal lands.

I am persuaded that the administrative treatment reflects what must have been the prevailing view that the lands had not been separated from the reservation. Even if there were some inconsistency, such inconsistency does not detract from the legal significance of an undeniable pattern of administration of the lands as tribal lands. In any event, neither the executive nor the legislative branches of the Government treated the 1893 Agreement and the 1894 Act as having worked an immediate cession of any reservation lands or termination of the reservation.[26]

In conclusion then, it appears far more likely than not, considering the actual language of the documents, the stated purpose of the Indians, the circumstances surrounding the negotiation of the agreement, the fact that the agreement was negotiated under the authority and therefore prescribed compensation terms of the General Allotment Act, and the overwhelming evidence of continuing treatment of the subject lands as reservation lands, that an immediate automatic cession of the irrigable and nonirrigable lands was not intended by either party to the agreement. Rather, it seems more logical that the cession of the reservation lands was contingent upon what the Indians perceived as adequate compensation—allotment to them of irrigable lands, sale of their surplus lands under profitable terms, the proceeds to be held in trust for the Tribe, the construction of an irrigation canal, and the opening of the area to settlement. I can find no legal or factual basis for separating the nonirrigable lands from the irrigable lands and deciding that the nonirrigable lands were not subject to fulfillment of such conditions. Indeed, strong argument can be drawn from the nonirrigable acreage section that cession of those lands was specifically tied to the condition that the area be returned to the public domain by executive order, opened to settlement and the tribe compensated as the lands were sold to settlers.[27]

[26] In 1900, both the Dept. of the Interior and the President felt it was necessary to issue an executive order (dated December 19, 1900) to withdraw certain lands in the then Territory of Arizona from the reservation by revoking the 1884 Executive Order as to those lands.

[27] Although the 1894 Act does not provide as detailed a description of the various duties of the Government as trustee as was the case in *Ash Sheep Co.* v. *United States*, 252 U.S. 159 (1920), some form of trusteeship status may

I believe that the foregoing interpretation of the agreement comports with the previously cited canons of construction relating to Indian agreements and statutes, in that it considers all relevant circumstances to determine what the parties intended and it resolves what may be ambiguous in the Indians' favor. Moreover, this interpretation is appropriate in light of the well established legal principle that Congressional action terminating or altering Indian property rights is not to be lightly inferred. Such Congressional intent must be clear.[28] Indeed, this interpretation is so well founded on the available information that to espouse the opposite interpretation, that the Indians ceded the nonirrigable lands for virtually no consideration, would violate this Department's obligation as trustee to follow an ordinary fiduciary standard in dealing with Indian property rights, *Seminole Nation* v. *United States*, 316 U.S. 286 at 297 (1942).

As the foregoing discussion of the Government's intent regarding the nonirrigable lands has demonstrated, the Government's intent and subsequent administration of the agreement and legislation certainly do not substantiate the interpretation that Congress intended to take title to those lands. There is no room, moreover, for asserting that the conditions of the agreement and ratifying statute were fulfilled, in any way, during the decade following the enactment of the ratifying statute. Therefore, no cession of the reservation lands became effective during that period.

The 1904 Act

The second legal issue on which correct resolution of the title question turns is whether, as the 1977 Opinion holds, the 1904 Act providing an allotment and irrigation scheme for both the Fort Yuma and Colorado River Reservations, was intended to implement the 1893 agreement and ratifying statute by fulfilling the United States' obligations undertaken in that agreement. The 1904 Act does not, as explained below, evidence Congressional intent to fulfill the conditions of the cession agreement and 1894 statute and to execute the cession of all the reservation lands, including the nonirrigable acreage. The case is more compelling, based on the language of the Act, as well as its legislative history, that Congress intend-

F.N. 27—Continued
be imputed to the Government over the Indian land until the fulfillment of the stated condition. While the 1936 Opinion recognizes that the agreement can be construed as conditional, Solicitor Margold concluded that the opening of the nonirrigable land was not a material condition. But, the fact that the requirement appears in the Agreement and is expanded in the Act indicates its importance to the Indians and to Congress. Otherwise, the parties could merely have stated that the land was ceded to the United States or placed in the public domain. Second, one policy of the General Allotment Act of 1887, 24 Stat. 388, which statute we have been recently told by the Supreme Court is relevant to the understanding of Indian legislation of the period (*Mattz* v. *Arnett*, 412 U.S. 481 (1973)), was to further the assimilation of Indian tribes into the non-Indian community. The condition of opening the lands to non-Indian settlement was, then, essentially part and parcel of a primary national policy with respect to Indians at the time.

[28] *Menominee Tribe* v. *United States*, 391 U.S. 404 (1968).

ed to create an entirely new scheme for the irrigation of the area under which there was no cession of "nonirrigable" lands. The language and entire purpose of the 1904 Act were restricted to allowing the "irrigable" reservation lands to be developed under the Reclamation Act of 1902 and the Act should not be interpreted as either a repeal or an implementation of the 1894 statute.

The Act of Apr. 21, 1904, Sec. 25, 33 Stat. 224, states:

> That in carrying out any irrigation enterprise which may be undertaken under the provisions of the reclamation Act of June seventeenth, nineteen hundred and two, and which may make possible and provide for, in connection with the reclamation of other lands, the reclamation of all or any portion of the irrigable lands on the Yuma and Colorado River Indian reservations in California and Arizona, the Secretary of the Interior is hereby authorized to divert the waters of the Colorado River and to reclaim, utilize, and dispose of any lands in said reservations which may be irrigable by such works in like manner as though the same were a part of the public domain: *Provided*, That there shall be reserved for and allotted to each of the Indians belonging on the said reservations five acres of the irrigable lands. The remainder of the lands irrigable in said reservations shall be disposed of to settlers under the provisions of the reclamation Act: *Provided further*, That there shall be added to the charges required to be paid under said Act by settlers upon the unallotted Indian lands such sum per acre as in the opinion of the Secretary of the Interior shall fairly represent the value of the unallotted lands in said reservations before reclamation; said sum to be paid in annual installments in the same manner as the charges under the reclamation Act. Such additional sum per acre, when paid, shall be used to pay into the reclamation fund the charges for the reclamation of the said allotted lands, and the remainder thereof shall be placed to the credit of said Indians and shall be expended from time to time, under the direction of the Secretary of the Interior, for their benefit.

In 1911, the statute was amended to provide for 10-acre rather than 5-acre allotments. Act of March 3, 1911, 36 Stat. 1058, 1063.

As in the case of the 1893 agreement and 1894 ratifying statute, the face of the 1904 Act does not compel any one interpretation concerning the effect of the Act on the cession of the nonirrigable lands. The language of the 1904 statute does not refer to the 1893 Agreement or to the status of nonirrigable lands. In fact, the statute does not limit its focus to the Fort Yuma Reservation but includes the Colorado River Reservation. The Act, moreover, authorizes a substantial reclamation project intended to include both Indian and nonreservation lands. The Act states that the Yuma project would take place "in connection with the reclamation of other lands." Furthermore, the 1904 Act, which does not refer to the nonirrigable lands, provides for *different* allotment and surplus land sale procedures from those agreed to by the parties in 1893 and subsequently ratified by Congress.

The 1894 Act provided for the United States to bear the cost of surveying and appraising the sur-

plus irrigable lands and to sell the lands at public auction with the proceeds from sale of these lands to be placed in a fund, with interest at 5% per annum, for the benefit of the Indians. The 1894 Act also provided that the private canal company, which was given three years to commence construction, must for ten years provide free water for one acre for each male adult Indian utilizing that water for growing crops. The canal company was also to bear the cost of canal construction. The 1904 Act, by contrast, made no provision for free water. It also credited to the Indians only that portion of the proceeds of sale as surplus irrigable land reflecting the value of the land *before* reclamation. Otherwise, the "surplus" irrigable lands were simply opened to settlement under the homestead laws, rather than being sold by the more favorable procedure of a public auction. The only other charges were for construction of the reclamation projects and these were not payable to the Tribe. Moreover, out of the amount the Tribe did receive under the 1904 Act, there would be taken the sum required to pay the reclamation charges for the land allotted to the Indians, a sharp contrast to the canal being constructed free of charge in the 1894 Act. Any balance remaining was held in a fund for the benefit of the Indians *without* provision for interest, as contrasted to the five percent interest provided in the 1894 Act.

Reference to the legislative history is helpful and appropriate in construing the scope of the Act. The 1904 Act was proposed by the Department. The Senate Report records in the letter of the Director of the Geological Survey, also read into the Congressional Record,[29] to the effect that the 1893 Agreement and 1894 Act had created a scheme for irrigation which never was realized, and that Congress was not to be restricted by the prior Agreement and Act, including the failure of the canal venture. This letter made specific reference to two contemporaneous Supreme Court decisions establishing that Congress was not bound by such agreements but "has full power to dispose of the Indian lands in such manner as it may consider best fitted for the benefit of the Indians." [30] The Senate Report then records a letter from the Commissioner of Indian Affairs which states that:

> The problem of providing these two reservations with irrigation systems is one which this office has thus far been unable to solve, and it therefore gives its hearty assent to the proposition of the Director of the Geological Survey, and earnestly recommends its adoption, believing that it promises relief to these Indians.[31]

A purpose, stated in the legislative history for bringing a reclamation project to the reservation was to construct a "portion" of a "general" and comprehensive system of utilizing the waters of the river to the best possible advantage". [32]

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[29] 38 Cong. Rec. 2811.

[30] *Cherokee Nation* v. *Hitchock*, 187 U.S. 294 (1902) and *Lone Wolf* v. *Hitchcock*, 187 U.S. 553 (1903), cited in 58th Cong. 2d Sess., Senate Report No. 1660 at 28.

[31] *Id.* at 29.

[32] *Id.* at 38.

It appears that some material in the legislative history might be susceptible of divergent interpretations. For example, the reference to the Yuma Indians' having already assented to allotments of five acres each ties the 1904 Act to the 1894 statute. But, I think that does little more than indicate what is already clear, that is, that Congress was aware of the 1894 statute. It does not compel the conclusion that the 1904 Act was an implementation of the prior act and cession agreement, with all the ramifications thereof. In addition, the letter from the Director of The Geological Survey, referred to above, might be interpreted as evidence of Congressional intent to implement the Act and cession agreement. But, the discussion in that letter is more susceptible to the interpretation that Congress believed it did not have to take action to acquire Indian land title before disposing of such land. In other words, effectuation of the cession agreement was not at all necessary for Congress to accomplish its stated purpose in 1904, namely provision of irrigation on the reservation as part of a major reclamation project involving the Colorado River. When it is clear that Congress knew it did not have to acquire Indian lands by cession before it could dispose of them, the burden of proving that Congress intended to effectuate a cession becomes more difficult. This is particularly true in the case of these nonirrigable lands which were nowhere mentioned in the Act or in the Director's letter.

In addition to the legislative history, the administrative practices, detailed earlier in this Opinion, support the interpretation that the title to the nonirrigable lands was not affected by this enactment.

In conclusion, interpreting the 1904 Act as an intended implementation of the cession agreement has little, if any, support in either the language, the legislative history, or subsequent administrative practice. Such interpretation would not conform with the applicable rules for interpreting Indian statutes, [33] particularly the rule that the cession of Indian property rights may not be lightly inferred. I think the interpretation which follows the language and stated purpose of the 1904 Act most closely is that the Act was not intended to implement and give legal effect to the agreement for the cession of the Fort Yuma lands. Rather, the nonirrigable lands were not affected in any practical way by that Act. Therefore, the conditional cession of the nonirrigable lands remained uneffected and title to those lands remains in the Quechan Tribe.

In the preceding discussion, I have explained why I have concluded that the Agreement and the 1894 statute must be construed as providing for a conditional conveyance of the nonirrigable lands; the 1904 Act did not, contrary to the

[33] See cases cited in footnote 3, *supra*.

1977 opinion of the Solicitor, implement the 1893 Agreement and ratifying Act. As a consequence, that conveyance was not validly effected. The 1977 opinion is overruled. Title to the subject property is held by the United States in trust for the Quechan Tribe. That title, however, is subject to interests which have vested in third parties as noted above.

LEO KRULITZ,
Solicitor.

MABLE M. FARLOW

(On Reconsideration after Hearing)

39 IBLA 15

Decided *January 11, 1979*

Reconsideration after hearing before Administrative Law Judge Ratzman of decision of the Oregon State Office, Bureau of Land Management, rejecting color of title application OR-12944.

Affirmed.

1. Color or Claim of Title: Generally—Color or Claim of Title: Cultivation—Color or Claim of Title: Improvements

To satisfy the requirements of a class 1 claim under the Color of Title Act, "valuable improvements" must exist on the land at the time the application is filed, or it must be shown that the land has been reduced to cultivation. If land was once cultivated, but is not cultivated at the time the application was filed and has not been cultivated for 10 years previously, the cultivation requirement of the Act has not been satisfied.

2. Color or Claim of Title: Description of Land

While the general rule is that a color of title claim must be based on a deed or other written instrument which on its face purports to convey the land sought, extrinsic evidence may be used to make definite the description in a deed which contains a latent ambiguity.

3. Administrative Procedure: Burden of Proof—Color or Claim of Title: Generally

The burden of proving a valid color of title claim is on the claimant. Where it cannot be said from the evidence presented that the grantors and grantees in the claimant's chain of title acquired a parcel of land with the bona fide belief that the parcel included all the land claimed, the color of title application must be denied.

4. Color or Claim of Title: Description of Land—Color or Claim of Title: Good Faith

Where extrinsic evidence does not adequately show that predecessors in a color of title claimant's chain of title, whose holdings must be tacked on to establish the requisite 20 years holding for a class 1 claim, could have a bona fide basis for believing that land described as lot 5, shown on the official Government plat on one side of a river, included land on the opposite side of the river, there could not be a good faith holding under color of title.

APPEARANCES: Dennis C. Karnopp, Esq., and C. Montee Kennedy, Esq., of Panner, Johnson, Marceau, Karnopp & Kennedy, Bend, Oregon, for appellant. Robert H. Memovich, Esq., for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE THOMPSON

INTERIOR BOARD OF LAND APPEALS

Mable M. Farlow filed application OR–12944 under the Color of Title Act, Dec. 22, 1928 (45 Stat. 1069), *as amended*, 43 U.S.C. § 1068 *et seq.* (1970) (hereinafter the Act), on June 27, 1974, for certain land west of the Deschutes River in sec. 12, T. 6 S., R. 13 E., Willamette meridian, Wasco County, Oregon. The deeds in appellant's chain of title described lots 3, 4, and 5 of sec. 12. On the official survey plat approved in 1883 these lots were shown to lie on the east side of the Deschutes River. That plat also showed a lot 6 on the west side of the river opposite lot 5. A dependent resurvey by the Bureau found that there were omitted lands in sec. 12 on the west side of the river between lot 6 and the river, and subdivided them. It is the land now designated as lot 8 by the resurvey which appellant claimed was covered by deed descriptions of lot 5, based upon certain maps and other information apart from the official 1883 survey. Appellant contended, in effect, that such extrinsic evidence showed that lot 5 straddled both sides of the river and gave a color of title to the land on the west side of the river. On Apr. 14, 1975, the Oregon State Office, Bureau of Land Management (BLM), rejected the application because no deed or written instrument in appellant's chain of title described land west of the Deschutes River.

Appellant appealed the BLM decision to this Board. On June 7, 1977, we set aside the decision and ordered a hearing to consider "extrinsic evidence to establish whether the deeds in her chain of title were based upon plats, records and other documents which can be read together with the deeds as creating a color of title beyond the actual title shown on an official federal survey plat," and whether there has been compliance with other requirements of the Act. *Mable M. Farlow*, 30 IBLA 320, 321, 84 I.D. 276 (1977).

As we stated in our prior decision:

> This case arose because the 1882 survey, * * * erroneously meandered the Deschutes River as flowing through the approximate center of the S ½ SE ¼ of section 12. By lot 5, the river actually curves and flows closer to the east township boundary. A 1972–73 dependent resurvey established new meanders of the river and subdivided the omitted lands in section 12 which are west of the river * * * [into lots 7 and 8]. The position of patented lot 5 is also shown in the SE ¼ SE ¼ [on the plat approved in 1974] but east of the river and is much smaller than shown on the 1883 survey plat.

Mable M. Farlow, *supra*, at 323.[1]

The hearing was held Apr. 26, 1978, in Redmond, Oregon, before Administrative Law Judge Dean F. Ratzman. His proposed findings and recommended determinations were made Sept. 18, 1978. In his recommended decision at p. 4,

[1] For a discussion of the rules governing boundaries along a meandered watercourse see the earlier decision, *Mable M. Farlow*, 30 IBLA 320, 84 I.D. 276 (1977).

Judge Ratzman sets out further certain facts in this case:

> The chain of title to properties in private ownership begins with a 1904 patent for land described as lots numbered 3, 4 and 5 in Section 12 according to the plat of survey approved in 1883. That survey plat depicts Lot 5 as containing land in the S ½ SE ¼ of Section 12 east of the river amounting to 30.96 acres. As has been indicated, land in the S ½ SE ¼ which is west of the river is designated on the 1883 plat as lot 6. [The unpatented portion of the E ½ of section 12 was withdrawn from entry in 1908. In 1930, Lot 6 was restored.]
>
> Transfers during 1927–1943 continued the reference to the conveyed lands as Lots 3, 4 and 5. In 1946 Mr. and Mrs. Farlow purchased Lot 5 for $50. The deed recited that mineral right to any part or parcel lying west [east] of the river were retained by the grantor. [2]
>
> At present there are no improvements on the claimed lands (Exs. 11, 11–A, Tr. 92, 98). The property was utilized to some extent for livestock grazing and raising turkeys. Tr. 92. A portion of the land was cultivated for part of the period between 1953 and 1964 by a tenant. The tenant, Mr. Johnson, paid $300 per year rent to the Farlows. He lived on adjacent Lot 2 during this period of time. Tr. 92, 93.

Judge Ratzman concluded, at p. 9:

> The 1908 withdrawal precludes approval of Mrs. Farlow's application. The applicant has failed to show that the cultivation or improvement requirement has been met. She has not substantiated the assertion that the Farlows and their predecessors in interest, held the lands in good faith under claim or color of title for more than twenty years. The application should be denied.

Appellant and BLM were allowed time in which to respond to the recommended decision. Appellant takes issue with Judge Ratzman's conclusions on three points. First, appellant argues that the land is open to entry and not withdrawn. Second, appellant states that she has met the cultivation or improvement requirement of the Act, thereby raising an equity in her favor. Appellant's third argument is that she has established good faith, adverse possession for more than 20 years under claims or color of title.

Our earlier statement that "the land west of the river is public land subject to a color of title application," [3] was predicated on an assumption that the land was not subject to a withdrawal. The issue of withdrawal was raised for the first time at the hearing. Because of our agreement with Judge Ratzman, otherwise, that appellant has failed to prove her color of title claim, it is unnecessary to decide the effect of the 1908 withdrawal and 1930 restoration of the E ½ of sec. 12 on the omitted land.

[1] The Color of Title Act, 43 U.S.C. § 1068 (1970), directs the Secretary of the Interior to issue a patent

> * * * whenever it shall be shown to his satisfaction that a tract of public land has been held in good faith and in peaceful, adverse, possession by a claimant, his ancestors or grantors, under claim or color of title for more than twenty years, and that valuable improvements have been placed on such land or some part thereof has been reduced to cultivation, * * *.

In 43 CFR 2540.0–5(b), a claim under this provision of the Color of

[2] Judge Ratzman mistakenly said "west" here. The reservation was of rights lying east of the river. 30 IBLA 323.

[3] *Mable M. Farlow, supra* at 326.

Title Act is called a "class 1" claim. To be entitled to a patent, the claimant must establish that each of the requirements for a class 1 claim has been met. *Lawrence E. Willmorth*, 32 IBLA 378 (1977); *Jeanne Pierresteguy*, 23 IBLA 358, 83 I.D. 23 (1976). The record in this case supports Judge Ratzman's conclusion that appellant has not established good faith possession under color of title for more than 20 years, or proved the existence of valuable improvements or cultivation as required by the Act.

On the issue of improvements or cultivation, appellant offered evidence that a small cabin was once placed on the land but in the early 1940's had been moved to other land. To satisfy the Act, the "valuable improvements" must exist on the land at the time the application is filed. *Lawrence E. Willmorth, supra; Lena A. Warner*, 11 IBLA 102 (1973); *Arthur Baker*, 64 I.D. 87 (1957). That there was once an improvement on the land which was removed many years prior to the application certainly does not suffice. *Id.* There was also evidence that appellant rented the land in "the late 1950's and early 1960's" (Tr. 92) for $300 per year and the tenant raised a "crop of grain or hay or something for his horses" and also "a large garden" (Tr. 76). Appellant asserts that this evidence raises an equity in her favor. As Judge Ratzman points out at p. 8:

> Buying land for $50 in 1946, and merely collecting an annual rental of $300 for several years while the renters made an effort to cultivate does not develop an equity—no facts have been provided as to the area cultivated, yields of hay, grain or vegetables, or any permanent improvement to the land which resulted from the cultivation. Reduction of the land to cultivation in the sense intended in the Act has not been shown.

We agree. Generally, throughout the public land law "cultivation" is viewed as a continuing activity with necessary efforts leading to the production of crops. For example, under the homestead laws where cultivation for a period of years has been necessary to meet the requirements for a patent, this Department has consistently ruled that there must be a breaking, planting, or seeding and tillage for a crop to be done in such a manner as to be reasonably calculated to produce profitable results. Acts which did not demonstrate good faith efforts cannot be considered "cultivation" under the law. *E.g., Clarence Ray Mathis*, 29 IBLA 150 (1977); *United States* v. *Nelson (Supp. I)*, 28 IBLA 314 (1977); *United States* v. *Garrett*, A–31064 (May 28, 1970); *Jess H. Nicholas, Jr.*, A–30065 (Oct. 13, 1964). Here, appellant's application was filed in 1974. From her own evidence, there is no indication of cultivation of the land for at least 10 or more years prior to the filing of the application. Thus, even if we found that land had once been cultivated by appellant's tenants and that would have sufficed under the Color of Title Act to be cultivation at the time crops were being produced, it cannot suffice

now. It cannot be said that land "has been reduced to cultivation" where there has been no effort at tillage of the land or other efforts made to produce a crop for at least 10 years. As we indicated that it is necessary to meet the improvement requirement at the time an application is filed, it is also clear that the Act envisages that the land "has been reduced to cultivation" at that time also. We need not decide here whether any breaks in cultivation activity could be accepted. It is sufficient to rule here that where land is not cultivated at the time the application has been filed and has not been cultivated for 10 years previously, the cultivation requirement of the Color of Title Act has not been satisfied.

[2] We have previously ruled in this case that appellant's good faith adverse possession under claim or color of title for more than 20 years must extend back to the 1939 conveyance from Fischer to Troutman.[4] We also held that while the general rule is that a color of title claim must be based on a deed or other written instrument which on its face purports to convey the land sought, *Manley Rustin*, 28 IBLA 205, 83 I.D. 617 (1976); *James E. Smith*, 13 IBLA 306, 80 I.D. 702 (1973), "extrinsic evidence may be used to make definite the description in a deed which contains a latent ambiguity * * *." *Mable M. Farlow*, *supra* at 329.

[3] The burden of proving a valid color of title claim is upon the claimant. *Lawrence E. Willmorth*, *supra; Jeanne Pierresteguy*, *supra.* The evidence presented at the hearing failed to establish good faith possession under claim or color of title for more than 20 years. Judge Ratzman summarized the evidence as follows:

> The only map in evidence that unquestionably was prepared prior to 1965, which shows Lot 5 as being on both sides of the river, is a railroad map. Mrs. Farlow had never seen a homesteading survey plat map of the type referred to in the Statement of Reasons. Tr. 98. Mr. Hunt testified as to blueprints of homestead entries but didn't know who prepared them. He had given them away, but indicated that they may have been prepared by a government agency. Tr. 43, 44.
>
> Mr. Pat McLoughlin of Wasco Title Company, stated in an affidavit in support of Mrs. Farlow's application, that maps of the County Assessor's Office and other public records have shown for at least 50 years that Lot 5 lies on both sides of the Deschutes River. His testimony at the hearing revealed that Mr. McLoughlin had not looked at Wasco County Assessor's maps until 1960. Tr. 13. He had no personal knowledge whether the assessor's maps as of 1951 showed Lot 5 as extending across the river. The so-called "old assessor's map" was examined by McLoughlin for the first time in 1962. Tr. 29. It is his recollection that it showed part of Lot 5 west of the river at that time. However, the map which was attached to the Statement of Reasons (Exhibit 1) contains information which was made available to the public in 1965.

[4] At 30 IBLA 330 we held: "Appellant and her husband learned of their defective title in 1961 during a lawsuit brought by their grantor to cancel the 1946 deed. Also in 1961, appellant's husband applied for a grazing lease on the lands from the United States. Therefore, appellant's 20-year period of good faith possession must pre-date 1961 and must include the conveyances of Mar. 25, 1939, and June 30, 1943." *See Joe I. Sanchez*, 32 IBLA 228 (1977).

An investigation by B.L.M. Realty Specialist Champ Vaughan, including inquiries at the Assessor's Office, failed to turn up assessor's maps older than 1965. Tr. 131. He was unable to obtain any specific information as to when any maps first showed Lot 5 as being on both sides of the river. Tr. 134. There is no evidence that the railroad map or homesteading survey plat maps were on file in the county records. When he made his recent investigation a 1933 Metsker map showing Lot 5 to be entirely on the east side of the river was on file in the office of the County Assessor. Tr. 119.

County tax records prior to February 1961, showed the assessment either as "Lot 5 EX. 1.20 A R/W 29.76 Acres" (from December 1946 to February, 1961) or as "Lots 3, 4, 5 EX 9.27 A R/W 55.44 Acres" (this notation was used prior to December, 1946). (Exhibits B through B-3). The 29.76 acres land area is the same as the one shown on the 1883 survey map. The record made at the hearing fully supports the following statements in 30 IBLA 330-331.

"It was not until 1946 that Lot 5 was severed from the entire parcel. From the charts, plats and maps in the record it appears that the error in the placement of the river by the 1883 survey did not so greatly affect the total acreage of the three lots [3, 4, and 5], which were all on the east side of the river. In comparison, the change in the river's location now shows the area shown on the 1883 plat as lots 3 and 4 to be much larger, with only lot 5 suffering a loss of acreage."

Exhibit B-4, a Wasco County tax record covering entries from February, 1961 through May, 1964, reveals that a change was made during that period, incorporating a reference to a portion of Lot 5 lying west of the river. This change in the tax and assessment document seemingly was made to reflect the fact that the Farlows conveyed to Mr. Hunt a segment of Lot 5 lying east of the river. Thus, it was not until 1961 that the tax authorities gave any indication that they considered part of Lot 5 to be west of the river.[5]

Recommended Dec. 4-5.

Under the Act the lands must have been held in good faith under claim or color of title for more than twenty years. Under the decision of the Interior Board of Land Appeals, the good faith possession of Mrs. Farlow or her grantors, under claim or color of title, must extend back to March 25, 1939, when Gertrude Fischer transferred Lots 3, 4 and 5 to Dorothy Troutman (Exhibit A-3). Mrs. Troutman's husband, A. E. Troutman, acquired and sold land in the Maupin area and was alert and careful in his business dealings. According to his sister-in-law, Mrs. Herrling, he made a careful check before he entered into a business transaction. Tr. 57.

It is the contention of the applicant that it should be presumed that because of Mr. Troutman's habitual care and prudence in land transactions he was aware of the railroad map or other documents which may have shown part of Lot 5 on both sides of the river, and believed that part of the property was on the west side when his wife acquired it in 1939. One could speculate that he acted in that belief when he arranged for the transfer. However, there is as much reason to surmise that by checking the Land Office records, or a Metsker map he learned that the official survey showed that land tract entirely on the east side of the river. It is possible that Mr. Troutman made his investigation in 1927 when he first acquired Lots 3, 4 and 5—the 1939 Fischer to Troutman transfer was a re-acquisition. It has not been established with certainty that in 1927 the railroad map depicted a portion of Lot 5 lying west of the river. With respect to 1927, the only fact that can be stated with confidence is that information regarding the 1883

[5] In any event, the mere paying of State or local taxes on Federal land is not sufficient to support a class 1 color of title claim. *See Manley Rustin, supra.*

survey was available. It has not been proven that either Mrs. Troutman or Mr. Troutman acquired Lot 5 in the belief *bonae fidei* that part of that lot was on the west side. This is the single greatest deficiency in Mrs. Farlow's case and it requires rejection of the application even if other inadequacies are ignored. [*Italics in original.*]

Recommended Dec. 8–9.

From our review of the record in this case, we find Judge Ratzman's evaluation of the evidence and conclusion correct.

[4] To summarize then, we conclude that it was necessary for appellant's predecessors in her chain of title, whose holdings must be tacked on to establish the requisite 20 years holding for a class 1 claim, to have had a bona fide basis for believing that lot 5 included land on the opposite side of the river from that shown on the official United States' plat of survey at the time of conveyances to and from them. However, the extrinsic evidence produced at the hearing did not adequately show that there was another lot 5, different from that shown on the United States' plat of survey, which was intended in the conveyances discussed above. Thus, there was not a good faith holding under color of title for the time required by the Act.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the recommended determination of Judge Ratzman, so far as consistent with the views expressed herein, is accepted and the application is denied.

JOAN B. THOMPSON,
Administrative Judge.

WE CONCUR:

EDWARD W. STUEBING,
Administrative Judge.

ANNE POINDEXTER LEWIS,
Administrative Judge.

COAL LEASING PROGRAM—RELATIONSHIP OF THE COST OF SURFACE OWNER CONSENT TO RECEIPT OF FAIR MARKET VALUE FOR FEDERALLY OWNED COAL

M–36909

January 15, 1979

1. Coal Leases and Permits: Leases—Mineral Leasing Act: Generally—Surface Mining Control and Reclamation Act of 1977: Surface Owner Consent.

The Secretary may, in computing the fair market value of coal to be leased competitively under privately owned surface, assume a limited surface owner consent cost, based on losses and costs to the surface estate and operation and similar evaluations, regardless of the actual price paid or the amount which a surface owner could otherwise demand for consent.

Assumption of a limited surface owner consent cost to be used in place of actual cost in the computation of fair market value of coal to be leased competitively is necessary to ensure receipt of fair market value by the public as required by 30 U.S.C. § 201(a) (1976).

In the exercise of his discretion to lease under the Mineral Leasing Act, the

Secretary has authority to decline to issue a coal lease where surface owner consent costs prevent the public from realizing a fair return on the value of the coal.

OPINION BY
OFFICE OF THE SOLICITOR

To: SECRETARY

FROM: SOLICITOR

SUBJECT: COAL LEASING PROGRAM—RELATIONSHIP OF THE COST OF SURFACE OWNER CONSENT TO RECEIPT OF FAIR MARKET VALUE FOR FEDERALLY OWNED COAL

ISSUE

The question to which this memorandum is directed is whether the Secretary, in computing the fair market value of Federal coal to be leased competitively under privately owned surface, may assume a ceiling cost of obtaining surface owner consent based on losses and costs to the surface estate and operation, thereby perhaps limiting the amount which will be paid to surface owners for consent to mine the underlying coal.

SUMMARY

I have concluded that the Secretary may, in computing fair market value, assume a limited surface owner consent cost based on losses and costs to the surface estate and operation or similar evaluations, regardless of the actual price paid or the price which a surface owner could otherwise demand for consent. Since the Department will set the minimum acceptable lease bid on the basis of this calculation, potential lessees may be constrained by competition to hold prices paid for consent at or below the ceiling in order to be able to pay the minimum bid and still recover the coal profitably. Thus, surface owner consent prices might be limited indirectly by the structure of the leasing process, without Departmental involvement in private consent negotiations.

My conclusion rests on several bases, principally these:

1. By law, the Secretary may lease coal competitively only upon receipt of a lease bid which is not less than the fair market value of the coal. The method used must ensure that the full value of the coal in place is returned to the United States, *i.e.*, that even if a payment is made to the surface owner in excess of losses and costs to the surface estate and surface operation, the Secretary must still get a fair payment for the value of the coal.

2. In the exercise of his discretion to lease under the Mineral Lands Leasing Act, the Secretary has authority to decline to issue a coal lease for many reasons, including situations where surface owner consent payments prevent the pub-

lic from receiving a fair return on the value of the public's coal.

3. Calculation of fair market value as proposed or Secretarial refusal to issue coal leases, because of excessive surface owner consent payments, which may have the effect of limiting surface owner consent prices, is consistent with the intent of Congress in enacting the Surface Mining Control and Reclamation Act of 1977.

The following discussion explains in greater detail the circumstances which raise the question and the legal considerations which lead to my conclusion.

DISCUSSION

Background

In the western states, a large portion of the land overlying federal coal is in private ownership. Originally, the acquisition of surface owner consent was but one alternative method for a lessee of the coal to obtain the right to mine. Its absence did not preclude leasing or mining, since the lessee was entitled to enter and mine upon posting bond or paying damages. 43 U.S.C. § 299 (1970). On most of these split-estate lands, the surface owner had the right to compensation only for damages to improvements, crops, and grazing values. 30 U.S.C. §§ 54, 81 (1976); 43 U.S.C. § 299 (1970).

With the passage of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), Pub. L. No. 95-87, 91 Stat. 445 (to be codified in 30 U.S.C. §§ 1201-1328 (1976)), Congress placed the surface owner in a position of greater control by making the authority of the Secretary to lease Federal coal under privately owned surface subject to the consent of the surface owner.

For persons who meet the requirements of a "surface owner," *i.e.*, (1) hold legal or equitable title to the land surface, (2) have their principal place of residence on the land or personally conduct ranching or farming operations on the land or receive a significant part of their income from ranching or farming on the land, and (3) have met those conditions for three years, the following limitation on leasing applies (SMCRA § 714(c)):

> **The Secretary shall not enter into any lease of Federal coal deposits until the surface owner has given written consent to enter and commence surface mining operations and the Secretary has obtained evidence of such consent. * * ***

SMCRA does not limit the amount which a surface owner can receive for his consent. The consequences of the absence of limitation become apparent when sec. 714(c) is read in conjunction with the mineral leasing laws. Sec. 714(b) of SMCRA provides that Federal coal deposits under private surface shall be offered for lease under sec. 2(a) of the Mineral Lands Leasing Act of 1920, 30 U.S.C. § 201(a) (1976), *as amended*. Sec. 2(a) *as amended* by sec. 2 of the Federal Coal Leasing Amendments Act of 1976 (FCLAA), 30 U.S.C. § 201(a)(1) (1976), Pub. L. No. 94-377, 90 Stat. 1083, Aug. 5, 1976, provides that, in leasing Federal coal:

> **No bid shall be accepted which is less than the fair market value, as deter-**

mined by the Secretary, of the coal subject to the lease. * * *

If the price of surface owner consent remains unlimited and the Government makes no effort to receive fair payment for its coal, the cost of obtaining consent can easily reduce the amount which lessees are able and willing to pay to the Government for the opportunity to recover the coal. If the cost of consent is sufficiently large, bids submitted for Federal coal leases arguably would not provide the fair return which Congress intended to flow to the public from the development of the coal. (*See* 123 Cong. Rec. S 8009 (daily ed. May 19, 1977)). Reading sec. 714(c) of SMCRA in connection with sec. 2 (a) of the Leasing Act, then, the question arises whether the Secretary may, in leasing Federal coal, calculate fair market value of that coal in such a way that the effect may be to limit the compensation paid to surface owners for consent.

Tentative Policy Preferences

On June 30, 1978, Secretary Andrus stated his preference that the Department limit payments to owners of surface overlying Federal coal if necessary to ensure that the public receives fair market value or to prevent the consent cost from raising coal prices to unreasonable levels. On Sept. 15, 1978, Under Secretary Joseph decided that, subject to my review, the preferred alternative for accomplishing this objective is to figure a preset level for the consent compensation costs in the fair market value determination made in the leasing process. If an amount greater than the preset level is paid by a potential lessee to the surface owner, the potential lessee will be economically unable (unless he is willing to accept a return on investment lower than that assumed by the Department in computing fair market value, or is able to alter other costs or prices upon which the computation is based), to pay the minimum bonus bid which the Department is willing to accept to issue the lease. Thus, basing the minimum acceptable bonus bid partially on the assumption of limited payment for surface owner consent tends to limit the prices of surface owner consent lessees will be willing to pay.

Calculation of Fair Market Value

"Fair market value" is traditionally defined as "the amount in cash or on terms reasonably equivalent to cash, for which in all probability the property would be sold by a knowledgeable owner willing but not obligated to sell to a knowledgeable purchaser who desired but is not obligated to buy." Interagency Land Acquisition Conference, *Uniform Appraisal Standards for Federal Land Acquisition* 3 (1973); 4 Nichols, *Eminent Domain* § 12.2[1] (3d ed. 1977).

It is worthwhile, at this point, to interject a brief description of the method by which the Department

determines the fair market value of leasable Federal coal.* The Geological Survey makes the initial determination of the coal resource economic value of a tract to be leased competitively. This estimate is submitted to the Bureau of Land Management which adds considerations such as alternative land uses and socioeconomic factors to arrive at the fair market value of the tract.

When possible, the Geological Survey uses a comparable sales approach to determine the mineral value of a tract. An estimate of value is made, according to this method, by comparing recent land transactions in the vicinity. Tracts are rated for comparability on the basis of location, time of the transaction, access to transportation facilities, highest and best use conditions and other physical and economic similarities and differences. Of course, the unavailability of adequate sales records or the absence of reasonably comparable transactions can render this approach useless.

If comparable sales data are unavailable, the Survey uses an income approach with discounted cash flow analysis. This method involves the calculation of annual revenues and costs resulting from development of the mineral resource. Annual revenue is figured by applying the market price of coal at the point of shipment to the volume of production scheduled for each year. After expected capital and operating costs are deducted, the resulting cash flow is discounted over time using an established discount rate to compute the net present value of the resource.

Relationship Between Fair Market Value and Surface Owner Consent Cost

In computing the fair market value of the coal subject to the lease, all costs of the coal recovery process will be reflected. *See* 4 Nichols, *Eminent Domain* § 13.22[2] (3d ed. 1977); *293.080 Acres of Land* v. *United States*, 169 F. Supp. 305 (W.D. Pa. 1959); Louis, *Mineral Valuation* 6, 109–16 (1923). This includes the cost of obtaining surface owner consent. This might suggest that there is no inconsistency in allowing unlimited consent costs and recovering fair market value. This is valid, however, only to the extent that the price of surface owner consent covers damages to the surface estate and operation.

Payment of unlimited consent costs would be consistent with recovery of fair market value only if the statute referred to the fair market value of the *lease*, for acquisition of the lease would not equal acquisition of the right to mine the coal. As the cost of acquiring surface owner consent increased, the amount which a lessee would be willing to pay for the lease would go proportionately lower, and the fair market value of the lease would be less.

But the statute requires that the Secretary lease for the fair market

*This description of the Department's procedures is derived mainly from the Tract Evaluation Issue Paper prepared by GS–BLM Task Force 155 for the Office of Coal Leasing (May 1978).

value of the *coal*. This is the market value to the owner of the mineral in place, which differs from the market value of severed coal by the cost of recovering the coal. *State* v. *Nunes*, 233 Or. 547, 379 P. 2d 579 (1963). The recovery cost includes damage to the surface caused by mining. Of course, no part of the value of the coal in place should be deducted in computing the fair market value of that coal to its owner, the public. Yet, that is exactly what could occur were the surface owner in a position to exact a consent payment based on the value of the coal itself—a payment in excess of losses and costs to the surface estate and operation—and this entire payment were included in the value computation.

Assuming a limited consent cost figure in the fair market value calculation would ensure that no lease is issued in which the return to the public is less than the fair market value of the severed coal less all legitimate recovery costs; payment for the value of the coal in place is not a legitimate recovery cost.

Assigning a value to the surface estate which excludes value attributable to the presence of underlying Federal coal is entirely consistent with existing law. The mineral estate and the surface estate have separately ascertainable market values. *Eagle Lake Improvement Co.* v. *United States*, 141 F. 2d 562 (5th Cir. 1944); *United States* v. *4.553 Acres of Land*, 208 F. Supp. 127 (N.D. Cal. 1962). It is natural and necessary that these distinct values be identified in order to ensure receipt of the full market value of the coal by the public. In determining the value of the surface, the calculation must be limited to its value for surface uses and must exclude elements of value attributable to minerals belonging to the United States, or other enhanced value created by the Government's need for the property. *Shoemaker* v. *United States*, 147 U.S. 282 (1893); *United States* v. *Miller*, 317 U.S. 369 (1943); *United States* v. *158.76 Acres of Land*, 298 F. 2d 559 (2d Cir. 1962).

Secretarial Discretion and Regulatory Authority

The Secretary has broad discretion "to prescribe necessary and proper rules and regulations and to do any and all things necessary" to accomplish the purposes of the Mineral Lands Leasing Act. 30 U.S.C. § 189; *Udall* v. *Tallman*. 380 U.S. 1 (1965). One of the principal purposes of the Act, *as amended* by the 1976 coal leasing legislation, is to provide for a fair return to the public from Federal coal leasing. S. Rep. No. 296, 94th Cong., 1st Sess. 13 (1975); H.R. Rep. No. 681, 94th Cong., 1st Sess. 17–18 (1975); 121 Cong. Rec. S 14556 (daily ed. July 31, 1975). As shown by the above discussion of the interrelationship between surface owner consent prices and receipt of fair

market value, indirect limitation of surface owner consent prices is one of the steps necessary to ensure fair return on the public's coal.

In the exercise of his discretion to lease under the Mineral Lands Leasing Act, the Secretary is authorized to refuse to lease where such action would be contrary to the purposes of the Act, and, in fact, is required to refuse to lease where contrary to the statutory objective of receiving fair market value. 30 U.S.C. § 201 (a) (1) (1976). The exercise of Secretarial discretion to decline to lease when high surface owner consent prices have the effect of reducing the amount a potential lessee is willing to pay the government for the lease is, in effect, a decision that the United States is not a willing seller at the price offered. When this is the case—that is, when, for lack of a willing seller, fair market value has not been offered—there is no doubt that the decision not to lease is proper.

Legislative History of the Surface Owner Consent Provision

Only after days of floor debate and conference committee negotiations did Congress arrive at the final version of the surface owner consent provision of the Surface Mining Control and Reclamation Act. The history of the bill suggests that a fair market value calculation which could indirectly limit consent payments would be consistent with Congressional objectives.

The principal purposes of the surface owner consent provision are to ensure that the livelihood of resident ranchers and farmers is not interrupted without their approval and to ensure that, when displaced, those surface owners do not suffer financially for the loss of the surface estate and surface operations. S. Rep. No. 128, 95th Cong., 1st Sess. 102(1977); 123 Cong. Rec. S 7999, S 8003, S8006, S 8008, S 12436, S 12440, H7598 (daily ed. May 19, July 20, 21, 1977). The idea that surface owners would be in a position to establish a price for consent based on the value of the coal underlying the surface was outrageous to Senators who opposed any consent provision not tied to a limit on compensation. 123 Cong. Rec. S 7999, S 12429 (daily ed. May 19, July 20, 1977) (remarks of Senators Johnston and Bumpers). The danger foreseen was that the surface owner could, in effect, assert through the consent provision an interest very much like a salable property interest in the mineral estate. This is an interest which the surface owner has never had in Federal coal and which Congress did not intend to transfer to the surface owner under sec. 714(g) of SMCRA:

> Nothing in this section shall be construed as increasing or diminishing any property rights by the United States or by any other landowner.

Congress made it quite clear that the surface owner veto of surface mining is absolute—that no system for override of the veto was intended. 123 Cong. Rec. S 7999–8012, S 8123–30 (daily ed. May 19, 20, 1977); H.R. Rep. No. 493, 95th Cong., 1st Sess. 115 (1977). Since the principal alternatives considered in the 1977 congressional de-

bates were limitation of consent prices through an override of nonconsent (by lessees upon payment of damages into court) and the provision enacted which has no limitation, there was no discussion of possible indirect limitations which might result from policies under consideration by the Department. *See* 123 Cong. Rec. S 7997–8012, S 8123–30, H 7591 (daily ed. May 19, 20, July 21, 1977).

Despite the unwillingness of Congress to directly limit payments with an override of nonconsent, there is a clear indication in the Senate debates that Secretarial action to control consent prices would be appropriate in instances where a landowner attempts to "sell the coal," *i.e.*, demands a consent price based not on the value of the surface estate, but of the Federal mineral estate. The following exchange between Senator Ford, a proponent of either limited consent or an override of nonconsent, and Senator Melcher, a proponent of the measure that was enacted, concerns the possibility that a surface owner may demand a royalty interest in the coal in exchange for consent:

> MR. FORD. If he has the privilege of denying or accepting the severance of the coal, would he not then have the right to say, "In lieu of so much per acre, I want 25 cents per ton royalty on the coal mined" or, "I want 50 cents per ton royalty"? Would he not have that privilege?
> MR. MELCHER. I say, in answer to the question, that the bill does not preclude it; but the bill does not suggest it, nor does the Mineral Leasing Act, under which the leases are let, suggest it.
> I might add that it would be contrary to the public interest; and *I am certain that the Secretary, under no circumstances, would favor it and if he knew about it, would disallow it.*
> However, if the Senator from Kentucky or any other Senator cares to stipulate in the bill that no surface owner may be recompensed on the basis of royalty, I would be delighted to support the amendment. It simply is not the practice and it is not done, nor was it envisioned to be done. But I have no objection to prohibiting it by an outright ban.

123 Cong. Rec. S 8128 (daily ed. May 20, 1977) (italics added).

This portion of the exchange shows that at least one strong proponent of the consent provision which emerged thought that the Secretary has independent authority to limit payment to the surface owner and that exercise of such authority would be consistent with the provision he was supporting.

Senator Melcher's views are consistent with the past practice of the Department in limiting prices in transactions involving minerals under Federal lease. The Secretary has previously issued regulations limiting the size of overriding royalties for oil and gas and for other leasable minerals including coal. 43 CFR 3103.3–6, 3503.3–2(c).

The continuation of the above colloquy confirms our interpretation:

> MR. FORD. The junior Senator from Kentucky is not a lawyer, but I would be hard pressed to think that the Secretary could disallow the agreement between the surface owner and mining company—if

we are saying that he has the right of turndown or acceptance. Would the Secretary have the right to disallow the arrangement whereby they could sever the coal based on a 25-cent or 50-cent per ton royalty?

MR. MELCHER. I think the marketplace has determined otherwise. It simply is not done. The Secretary, in allowing the lease to a coal company, is going to look, first of all, at whether there is written consent. *If he wishes to look into the circumstances as to how that written consent is arrived at, he certainly may—and in the public interest, probably would.*

123 Cong. Rec. S 8128 (daily ed. May 20, 1977) (italics added).

This exchange supports Secretarial action to control consent payments to surface owners. There is no discussion which indicates an intent to prevent the Secretary from controlling consent prices. I conclude, therefore, that the indirect limitation of surface owner consent prices—through assumption of a limited consent cost in the computation of the fair market value of the coal which must be bid before a lease can be issued—would be completely consistent with SMCRA.

"Those minerals * * * are the people's minerals." 123 Cong. Rec. S 8002 (daily ed. May 19, 1977) (remarks of Sen. Haskell). Prevention of unjust enrichment by Secretarial actions discouraging surface owners from pricing consent on the basis of the value of the publicly owned mineral estate was contemplated and suggested by Congress, as long as there is no interference with the surface owner's superior right to say "no." This last caveat prevents tying a limitation on consent prices to a nonconsent override, but does not conflict with the proposal under consideration by the Department.

The Department's proposal accomplishes the congressional objective of avoiding consent payments based on the value of the Federal coal, while maintaining the integrity of the surface owner consent provision by preserving the ultimate right of the surface owner to veto strip mining on his land.

Timing of Consent Acquisition

Using appraised surface value rather than consent cost in the fair market value determination is the ordinary and might, in some situations, be the sole way to compute fair market value. The Senate Report on SMCRA, in discussing the surface owner consent provision, states: "It is anticipated that negotiations will take place after the bids are opened, but before the lease is issued by the Secretary." S. Rep. No. 128, 95th Cong., 1st Sess. 102 (1977).

Since the fair market value is calculated prior to the opening of bids in order to set the minimum acceptable bid, the actual consent price would be unavailable to the Department at the time of the calculation. It follows that, in the procedure contemplated by the Senate Committee, an amount other than actual consent cost must be used to find fair market value. The natural method of computing this alternative amount is appraisal of the surface estate, its likely damages and losses to the surface operation. Determination of the losses and costs to be incurred by the surface

owner due to the mining operation is the economically sound method of assigning a value to the consent, and what we must conclude the Senate Committee had in mind in this scenario.

Contrary to the Senate Committee's expectation, the Department proposes in most cases to hold no lease sales unless consent has been given. Yet the preferred options identified by Under Secretary Joseph on Sept. 15, 1978, suggest that some lease sales will be held prior to acquisition of consent. When that sequence envisioned by the Senate Committee actually occurs, the Department must, in computing fair market value, assume a reasonable consent cost in place of actual price. If this were to occur in certain cases, while fair market value were calculated in other cases on the basis of actual consent prices which exceeded costs and losses to the surface estate and operation, the resulting variations in minimum acceptable bonus bids unrelated to variations in the value of the Federal coal would not only be inequitable, but clearly contrary to the statutory policy embodied in the fair market value requirement.

CONCLUSION

In conclusion, having examined both the coal leasing and surface mining laws, their legislative histories, and the policies behind them, I conclude that the Secretary may, to ensure a fair return to the public from federally leased coal under privately owned surface, use, as the cost of surface owner consent, the amount of damages resulting from disruption of the surface estate or a similar figure rather than the actual payment which a surface owner has received or may receive for his consent.

I recognize that the surface estate may have values to the surface owner which cannot be measured by the economic computation of the Department. I hasten to add, therefore, that the limitation on the consent price which may result from this policy is only for the purpose of computing the minimum lease bid which the Department will accept so the public will receive a fair return from sale of the coal. Nothing in the approach being considered by the Department will force the surface owner to accept a payment below the value of the land to that owner, or will force a surface owner to give consent. The surface owner retains an absolute veto against leasing Federal coal underlying his surface, and the negotiation of the consent price will remain a matter between private parties; any amount may be paid so long as the Department receives the fair market value of the coal.

This opinion was prepared with the assistance of John D. Leshy, Associate Solicitor for Energy and Resources, Robert J. Uram, Assistant Solicitor for Onshore Minerals, Robert G. Berger and

Lawrence G. McBride, Attorneys, Branch of Onshore Minerals.

LEO M. KRULITZ,
Solicitor.

THUNDERBIRD COAL CORP.

v.

OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT

1 IBSMA 85

Decided *January 18, 1979*

Cross appeals by Thunderbird Coal Corp. and the Office of Surface Mining Reclamation and Enforcement from a Sept. 12, 1978 decision of Chief Administrative Law Judge Luoma, as to Docket No. NX-8-3-R, upholding in part a notice of violation of 30 CFR 715.17(a) issued in accordance with sec. 521(a)(3) of the Surface Mining Control and Reclamation Act of 1977.

Reversed.

1. Surface Mining Control and Reclamation Act of 1977: Water Quality Standards and Effluent Limitations: Discharges from Disturbed Areas

Discharges from any portion of a permitted area that is disturbed in the course of the permittee's mining operations must comply with the effluent limitations contained in 30 CFR 715.17 (a) of the Department's initial regulatory program.

2. Surface Mining Control and Reclamation Act of 1977: Water Quality Standards and Effluent Limitations: Disturbed Areas: Sedimentation Ponds

A sedimentation pond is a "disturbed area," as that term is defined for the purpose of 30 CFR 715.17(a) of the Department's initial regulatory program, when any portion of the permitted area which drains into the sedimentation pond has been disturbed by the permittee other than by the construction of other sedimentation ponds, roads, or diversion ditches.

APPEARANCES: J. T. Begley, Esq., and John P. Williams, Esq., for Office of Surface Mining Reclamation and Enforcement; Samuel E. Davies, Esq., for Thunderbird Coal Corp.

OPINION BY THE INTERIOR BOARD OF SURFACE MINING AND RECLAMATION APEALS

Cross appeals have been filed with the Board by the Office of Surface Mining Reclamation and Enforcement (OSM) and Thunderbird Coal Corp. (Thunderbird) from an administrative law judge's decision upholding in part a notice of violation issued to Thunderbird pursuant to sec. 521(a)(3) of the Surface Mining Control and Reclamation Act of 1977.[1] The principal issue for decision by the Board is: When drainage *into* the final sedimentation pond in a permittee's water quality control system is both from areas that have been disturbed by the permittee and areas that have not been so disturbed, does sec. 715.17(a) of the Department's interim regulations require that the discharges *from* the sedimentation pond comply with the effluent limitations expressed therein? The administrative law judge held that

[1] *See* Act of Aug. 3, 1977, 91 Stat. 445, 505 and 30 U.S.C.A. § 1271(a)(3) (West Supp. 1978).

only the percentage of discharges derived from disturbed areas must so comply. We hold that all discharges from such a sedimentation pond must comply with the effluent limitations expressed in sec. 715.17 (a). We therefore reverse.

Facts

The relevant facts in these appeals are not disputed by the parties. Thunderbird, a Kentucky corporation, conducts its surface coal mining operation under the authority of Permit No. 6414–77, issued by the Commonwealth of Kentucky. Much of the permitted area, comprising 100 acres, was previously mined for coal at least 15 to 20 years ago. The excavations thus created were not reclaimed and have resulted in highly acidic surface water drainage. Prior to the commencement of Thunderbird's current operation, the pH level of the drainage from the previously mined area was measured as 2.8 and 3.2 at two different sampling points.

When OSM issued its notice of violation to Thunderbird, the company had mined or otherwise directly disturbed approximately 26 acres of the permitted area. Before completing its operation, Thunderbird anticipates that it will have mined and reclaimed all but 10 to 12 acres of the permitted area. To control the quality of surface water drainage from its permitted area, Thunderbird devised a mining plan which includes the construction of four sedimentation ponds. When OSM issued its notice of violation, one of these ponds (Structure No. 1) was completed, and a second pond (Structure No. 4) was completed except for the final emplacement of an emergency spillway (a temporary emergency spillway had been constructed). Structure No. 4 has the lowest topographical placement of the sedimentation ponds planned by Thunderbird; all surface water drainage from the permitted area passes through Structure No. 4.

On June 15, 1978, surface water drainage into Structure No. 4 comprised: (1) treated discharges from Structure No. 1 of drainage from areas disturbed by Thunderbird; (2) drainage from a small area (less than 1 acre) disturbed by Thunderbird which bypassed Structure No. 1; and (3) drainage from an area not yet disturbed by Thunderbird which also bypassed Structure No. 1. OSM's inspectors sampled the discharges from both Structure No. 1 and Structure No. 4, on the above date. The pH level of the sample from Structure No. 1 was found to be in compliance with the effluent limitation expressed in sec. 715.17 (a) of the Department's interim regulations; that from Structure No. 4 was found to be 4.5, which is not within the range of 6.0 to 9.0 specified as the pH level limitation in sec. 715.17(a).[2] On the basis of the pH level measured for discharges from Structure No. 4, OSM issued a notice of violation to Thunderbird, specifying a violation of sec. 715.17(a). Thunderbird was directed by OSM to treat the dis-

[2] *See* 42 FR 62685 (Dec. 13, 1977) (to be codified in 30 CFR 715.17(a)).

charges from Structure No. 4, in order to maintain the pH level of these between 6.0 and 9.0. Thunderbird was to submit a treatment plan for approval to the Commonwealth of Kentucky by June 29, 1978, and to implement an approved plan by July 27, 1978.

At the request of Thunderbird, an informal conference was held at its mine site on June 28, 1978. Because OSM did not alter its position as a result of this conference, Thunderbird sought further review of the notice of violation and was granted a hearing before an administrative law judge, held on July 20, 1978.[3] The administrative law judge's decision of Sept. 12, 1978, affirmed the notice of violation "to the extent that it applies to the 5 percent of water coming from the disturbed area" which had not been treated in Structure No. 1, but found that "[the] Applicant is not responsible for the condition of water which flows from * * * undisturbed land." Both Thunderbird and OSM made timely appeals to the Board from the decision rendered by the administrative law judge.[4]

Discussion

Sec. 715.17(a) of the Department's interim regulations, which controls the resolution of these appeals, contains the following provisions:

> All surface drainage from the disturbed area, including disturbed areas that have been graded, seeded, or planted, shall be passed through a sedimentation pond or a series of sedimentation ponds before leaving the permit area. Sedimentation ponds shall be retained until drainage from the disturbed area has met the water quality requirements of this section and the revegetation requirements of § 715.20 have been met. * * * For purpose of this section only, *disturbed area shall not include those areas in which only diversion ditches, sedimentation ponds, or roads are installed in accordance with this section and the upstream area is not otherwise disturbed by the permittee.* * * * Discharges from areas disturbed by surface coal mining and reclamation operations must meet all applicable Federal and State laws and regulations and, at a minimum, the following numerical effluent limitations [italics added]:
>
> * * * * *
>
> pH Within the range 6.0 to 9.0. [Taken from Table.]
>
> * * * * *
>
> (2) The permittee shall install, operate, and maintain adequate facilities to treat any water discharged from the disturbed area that violates applicable Federal or State laws or regulations or the limitations of paragraph (a).[5]

Thunderbird's position is premised on the fact that not all of the drainage impounded in Structure No. 4, on the date of OSM's inspection, derived from portions of the permitted area that had been disturbed by the company's mining operations. Thunderbird argues that the results of the tests performed by OSM on discharges *from*

[3] This hearing was conducted pursuant to the authority expressed in 30 U.S.C.A. § 1275 (West Supp. 1978) and 43 FR 34393–4 (Aug. 3, 1978) (to be codified in 43 CFR 4.1160–4.1171).

[4] See 43 FR 34398 (Aug. 3, 1978) (to be codified in 43 CFR 4.1271). OSM filed its notice of appeal with the Board on Oct. 10, 1978; Thunderbird filed its notice on Oct. 11, 1978.

[5] 42 FR 62683 (Dec. 13, 1977) (to be codified in 30 CFR 715.17(a)).

Structure No. 4 thus do not satisfy OSM's burden of proof in respect of the notice of violation.[6] The administrative law judge agreed with the assertion that Thunderbird should not be held responsible for the quality of all drainage impounded in Structure No. 4; however, the judge determined that the notice of violation was validly issued as to that drainage which was shown to derive from an area disturbed by Thunderbird and which did not pass through and become treated at Structure No. 1. The judge did not specify the evidence upon which he relied to support his statement that the pH level of this particular drainage was shown to be in violation of the effluent limitation expressed in sec. 715.17(a). Moreover, the Board's review of the record has disclosed no such evidence. The Board does not agree with Thunderbird, however, that this lack of evidence is dispositive in these appeals. Instead, the Board has determined that, under the circumstances disclosed by OSM's inspection, all discharges from Structure No. 4 are subject to the pH level limitation expressed in sec. 715.17(a).

[1, 2] Sec. 715.17(a) requires that the quality of discharges from areas disturbed by a permittee must comply, at a minimum, with the effluent limitations expressed therein. The term "disturbed area" is defined, generally, to mean "those lands that have been affected by surface coal mining and reclamation operations."[7] This definition is qualified for the purpose of sec. 715.17(a), however, by the provision that "disturbed area shall not include those areas in which only diversion ditches, sedimentation ponds, or roads are installed in accordance with [sec. 715.17(a)] *and the upstream area is not otherwise disturbed by the permittee*" (italics added).[8] The purpose of this qualification is clear. In its absence, diversion ditches, sedimentation ponds and roads would always constitute disturbances of a permitted area, and drainage in a permitted area which might contact any of these structure would be subject to the effluent limitations expressed in sec. 715.17(a). The Secretary has relieved a permittee from the obligation of maintaining the quality of such drainage, however, when (1) a diversion ditch, sedimentation pond, or road is installed in accordance with sec. 715.17(a), and (2) that portion of the permitted area which is upstream, in relation to any such structure, is not disturbed by the permittee other than to the extent necessary for the installation of the structure. This means, for example, that a permittee may construct a sedimentation pond in anticipation of mining coal on a portion of the permitted area which drains into the pond, without thereby becoming responsible for

[6] OSM has the burden of establishing a prima facie case as to the validity of a notice of violation. *See* 43 FR 34394 (Aug. 3, 1978) (to be codified in 43 CFR 4.1171(a)).

[7] 42 FR 62678 (Dec. 13, 1977) (to be codified in 30 CFR 710.5).

[8] 42 FR 62685 (Dec. 13, 1977) (to be codified in 30 CFR 715.17(a)).

the quality of drainage that might pass through the pond before the mining operations proceed further. But, at such time as the operations of the permittee disturb any portion of the permitted area which drains into the sedimentation pond, other than as is necessary for the installation of other sedimentation ponds, roads, or diversion ditches, the permittee must assume responsibility for the quality of all discharges from that pond. This is because the sedimentation pond thereby becomes a "disturbed area," as that term is defined for the purpose of sec. 715.17(a).[9]

As was previously noted, the record reveals that Thunderbird has disturbed portions of the permitted area that drain into Structure No. 4, other than by the installation of sedimentation ponds, diversion ditches or roads.[10] Thus, Structure No. 4 is, itself, a "disturbed area," and Thunderbird must maintain the pH level of discharges from this structure within the range 6.0 to 9.0. The company has not rebutted OSM's assertion that, on June 15, 1978, the pH level of discharges from Structure No. 4 was 4.5, so the Board must conclude that the notice of violation was validly issued.

We hold that Thunderbird was responsible for the quality of discharges from Structure No. 4, under the circumstances disclosed by OSM's inspection and described above, rather than for only the quality of untreated drainage into Structure No. 4 from disturbed portions of the permitted area. The administrative law judge's decision is therefore reversed, and OSM is authorized to take further enforcement action consistent with this decision.

So ordered.

IRALINE G. BARNES,
Administrative Judge.

WILL A. IRWIN,
Chief Administrative Judge.

ADMINISTRATIVE JUDGE MIRKIN DISSENTING:

The majority has issued a finely reasoned, cogently stated opinion that informs the parties to the appeal why the case has been disposed of the way it has, and that advises future potential parties who are similarly situated the way similar appeals will be treated. The opinion is entirely consistent with both national and departmental goals concerning the environment.[1] The

[9] One of the purposes of the Secretary's requirement that drainage from disturbed areas be passed through sedimentation ponds is to facilitate monitoring of mining operations. *See* Comment 8, 42 FR 62650 (Dec. 13, 1977). The Board's interpretation of sec. 715.17(a) is consistent with this purpose. In contrast, the interpretation of sec. 715.17(a) suggested by the administrative law judge would place on OSM the burden of monitoring drainage quality in the watershed area above a sedimentation pond, whenever the drainage into a sedimentation pond comprises drainage from both disturbed and undisturbed portions of the permitted area. Such a burden was clearly not intended by the Secretary to be imposed on OSM.

[10] *See text, supra,* at p. 39; Transcript of the hearing before the administrative law judge on Sept. 12, 1978, at 121–122; Ex. 2.

[1] Secs. 101 and 102 of the Act, 91 Stat. 445, 447, 448; sec. 700.2 of the interim regulations, 42 FR 62675 (Dec. 13, 1977).

problem before us, though, is whether those goals have been implemented in the manner asserted by the majority. I agree with much of what the majority has said. All that is required for my total agreement is a prodigious act of interpretation. I cannot perform that act.

For the purposes of this dissent, the important facts are that there were two sedimentation ponds (1 and 4), neither of which was in a site where actual excavation was taking place.[2] Surface water drainage from the disturbed area went into pond No. 1 and was treated so that the pH level was satisfactory. Water was then discharged from pond No. 1 which flowed into pond No. 4 where it comingled with drainage from a disturbed area (which drainage did not pass through pond No. 1) and drainage from an undisturbed area. Discharges from pond No. 4 had an unacceptably low pH level. No evidence was offered to demonstrate the pH level of either the untreated drainage from the disturbed area or the drainage from the undisturbed area before they entered pond No. 4. Nevertheless, the majority has held that the sedimentation pond itself constitutes a disturbed area. In effect, then, this means that for a sedimentation pond *not* to constitute a disturbed area, it must exist alone or, at best, in anticipation of a surface mining disturbance that is to be commenced at a later date. The Department could have defined "disturbed area" to be so encompassing. The question then becomes whether there is any evidence that it did so.

Sec. 710.5 of the interim regulations defines "disturbed area" to mean "those lands that have been affected by surface coal mining and reclamation operations." Taken alone, this does not provide too much guidance. However, the "surface coal mining" referred to in sec. 710.5 is itself defined in sec. 700.5. That definition refers to a variety of excavation activities and, in addition to those activities,

> adjacent land, the use of which is incidental to any such activities, all lands affected by the construction of new roads or the improvement or use of existing roads to gain access to the site of such activities and for haulage and excavation, workings, impoundments, dams, ventilation shafts, entryways, refuse banks, dumps, stockpiles, overburden piles, spoil banks, culm banks, tailings, holes or depressions, repair areas, storage areas, processing areas, shipping areas and other areas upon which are sited structures, facilities, or other property or material on the surface, resulting from or incident to such activities.

42 FR 62677 (Dec. 13, 1977).

Immediately after this, "surface coal mining and reclamation operations" is defined as "mining operations and all activities necessary and incidental to the reclamation of such operations. * * *"[3] Although

[2] Ex. 3 is a map that was relied upon by both parties. It delineates areas that were disturbed in the past, areas that have been or will be disturbed by Thunderbird, and undisturbed areas. All sedimentation ponds are shown to be in undisturbed areas—at least as that term is understood by the parties.

[3] These definitions track the ones in sec. 701(27) and (28) of the Act. 91 Stat. 445, 518

not specifically defined in the interim regulations, "resulting from or incident to" is defined in the proposed permanent regulations to mean "a relation between two events such that when one event occurs the other event will, in the natural sequence of events, also occur." [4]

The catalogue of adjacent land uses in section 700.5 which constitute surface coal mining operations is specific, not generic. "Sedimentation pond" is not in that number.

Indicative of the difficulties concerning what sedimentation ponds are to disturbed areas and *vice versa*, the Department felt it necessary to comment on this relationship when questions were raised during the comment period after the proposal of the interim regulations and before their adoption. In its brief to the Board, OSM presented the following history of sec. 715.17(a):

> Section 715.17(a) in the *proposed* rules required the following:
>
> "Discharges *from the entire permit area* must meet all applicable Federal and State water quality standards and the following numerical effluent limitations: * * *." (italics added) 42 Fed. Reg. 44,933 (1977).
>
> This is in sharp contrast to the language of the final rules, which required the following.
>
> "Discharges *from areas disturbed by surface coal mining and reclamation operations* must meet all applicable Federal and State laws and regulations, and, at a minimum, the following numerical effluent limitations: * * *." (italics added) 42 Fed. Reg. 62,685 (1977).
>
> The reason behind the change in language was discussed in Comment No. 10 of the preamble to the final rules:
>
> "In response to several comments, the regulations require application of the effluent limitations only to discharges from the disturbed area and not to discharges from areas the permittee has not disturbed through mining and reclamation * * *. Effluent limitations do not apply to discharges from undisturbed areas." 42 Fed. Reg. 62,651 (1977).[5]

The majority interpretation, nevertheless, by expanding the definition of disturbed areas, captures those activities which the Department indicated in comment 10 it was excluding from the substantive regulatory requirements of sec. 715.17(a). In the departmental analysis of the scope and meaning of sec. 816.42 of the proposed permanent regulations the Department also seems to be of the opinion that the regulation is not yet all inclusive. Sec. 816.42 is the analog of sec. 715.17(a) of the interim regulations. The Department reaffirms comment 10 previously cited, and goes on to say: "If necessary, however, the office will promulgate more stringent limitations and requirements in the future to protect water quality." [6] The way to do this is by amendment of the rules, not by construction by this Board.

Indeed, the conduct amounting to the alleged violation could have been regulated in a number of ways not requiring this extreme interpretation of departmental regulations. Had the discharge from the untreated disturbed area been tested and found to be deficient, the results of that test could have been offered as evidence of the violation

[4] Sec. 700.5, 43 FR 41801 (Sept. 18, 1978).

[5] Brief of OSM, Nov. 17, 1978, at pp. 6, 7.

[6] 43 FR 41745, 41746 (Sept. 18, 1978).

charged by OSM. No such evidence was offered. Had the activity violated Kentucky law, as urged by OSM, at the hearing and in its brief, referral to the Kentucky authorities could have solved the problem. E.P.A. regulations were also asserted to forbid the comingling of satisfactory and unsatisfactory waters if the overall result is unsatisfactory.[7] The matter could have been referred to E.P.A. for correction. All I am saying is that departmental regulations, as presently constituted, are not sufficiently broad to embrace the activity that is the subject of this appeal. As these are interim regulations and the Department is now in the process of promulgating permanent regulations, it has an ideal opportunity to state precisely the scope of its effort to regulate effluent discharges.

For these reasons, I would reverse as to OSM and grant the appeal of Thunderbird.

MELVIN J. MIRKIN,
Administrative Judge.

APPEAL OF STATE OF ALASKA

3 ANCAB 129

Decided *January 19, 1979*

Appeal of State of Alaska from the Bureau of Land Management Decision Nos. AA-6685-B, A-050463-C, etc.

Remanded to the Bureau of Land Management for action consistent with the decision.

[7] 40 CFR Part 434.

1. Alaska Native Claims Settlement Act: Alaska Native Claims Appeal Board: Appeals: Summary Dismissal

An issue in an appeal will be dismissed for lack of diligent prosecution when a party fails to respond to an Order of this Board requiring a showing of cause why an issue should not be dismissed.

2. Alaska Native Claims Settlement Act: Administrative Procedure: Generally—Alaska Native Claims Settlement Act: Alaska Native Claims Appeal Board: Appeals: Generally

ANCAB is bound by statements of Secretarial policy contained in Secretarial Orders published in the *Federal Register*.

3. Alaska Native Claims Settlement Act: Alaska Native Claims Appeal Board: Appeals: Generally

A timely appealed Bureau of Land Management decision does not constitute a final Departmental decision as that term is used in sentence 5, sec. 2 of S.O. 3029.

APPEARANCES: James N. Reeves, Esq., Assistant Attorney General and Shelley J. Higgins, Esq., Assistant Attorney General, on behalf of the State of Alaska; Bruce Schultheis, Esq., Office of the Regional Solicitor, on behalf of the Bureau of Land Management; James D. Linxwiler, Esq., on behalf of Cook Inlet Region, Inc.: and Richard G. Encelewski, General Manager, Ninilchik Natives Association, Inc.

OPINION BY ALASKA NATIVE CLAIMS APPEAL BOARD

The Alaska Native Claims Appeal Board, pursuant to delegation of authority in the Alaska Native

Claims Settlement Act, 43 U.S.C. §§ 1601–1624 (Supp. IV, 1974), *as amended*, 89 Stat. 1145 (1976), and the implementing regulations in 43 CFR Part 2650, and Part 4, Subpart J (1975), hereby makes the following findings, conclusions and decision.

On May 8, 1978, the State of Alaska filed a Notice of Appeal and Statement of Reasons for Appeal in the above-entitled case. The State of Alaska alleged that there were three issues subject to appeal. The first issue was that the Bureau of Land Management erred in its treatment of certain third-party interests held under A.S. 38.05.077, which are also known as "open-to-entry leases." The second issue concerned the Bureau of Land Management's failure to reserve an easement for a road which lies in the S ½ N ½ of sec. 29, T. 4 S., R. 14 W., Seward meridian. The third issue raised was that the Bureau of Land Management erred in approving for interim conveyance the E ½ NE ¼ SW ¼ of sec. 34, T. 1 S., R. 14 W., Seward meridian, also known as the Ninilchik Highway Maintenance site, on the grounds that the State of Alaska holds title to said parcel.

On May 10, 1978, this Board ordered the segregation of all lands described by the State as being subject to dispute in this appeal.

On June 21, 1978, Cook Inlet Region, Inc. (CIRI) and Ninilchik Natives Association, Inc. (NNAI), replied to the State of Alaska's Statement of Reasons for Appeal. CIRI and NNAI requested that the State's appeal regarding the open-to-entry leases be held in abeyance pending the reconsideration of Secretarial Order 3016 (Dec. 14, 1977, 85 I.D. 1 (1978)) which concerned Departmental treatment of the open-to-entry leases. They also stated that the issue of a road easement contained in para. 2 of the State's pleading should be remanded to the Bureau of Land Management with instructions to include it as an easement. As to the third issue involving the property more commonly known as the Ninilchik Highway Maintenance site, CIRI and NNAI requested that the State of Alaska submit evidence of its interests of whatever nature in such lands, and that the Board thereafter establish a briefing schedule on this issue.

The Bureau of Land Management also submitted an answer to the State of Alaska's Statement of Reasons for Appeal requesting the same relief as CIRI and NNAI except that the Bureau of Land Management requested that the question on the Ninilchik Highway Maintenance site be remanded to the Bureau of Land Management and the State be given 30 days in which to submit evidence of ownership of such site.

On July 12, 1978, this Board suspended all further briefing in this appeal with respect to the treatment of open-to-entry leases in said BLM decision pending the reconsideration of S.O. 3016. Since all parties had agreed to the reservation of an easement for the road which lies in the S ½ N ½ of sec. 29, T. 4 S., R

14 W., the Board ordered that such be included by the Bureau of Land Management as an easement in the decision and interim conveyance. The Board also ordered the State of Alaska to submit to the Board, evidence of its interests of whatever nature in the E ½ NE ¼ SW ¼ of sec. 34, T. 1 S., R. 14 W., Seward meridian, also known as the Ninilchik Highway Maintenance site.

On Aug. 14, 1978, the State of Alaska submitted a document entitled "Statement of Interest," together with various exhibits. The Statement of Interest alleged that the State of Alaska received a quitclaim deed dated June 30, 1959, to the Ninilchik Highway Maintenance site, pursuant to the Alaska Omnibus Act, P.L. 86–70 (June 25, 1959), 73 Stat. 141. The exhibits filed with this Statement include a quitclaim deed from the Secretary of Commerce, U.S. Department of Commerce, to the State of Alaska. This deed conveyed lands which were described in three different schedules, one of which was identified as Schedule C in the deed. Submitted along with the copy of the deed was a photocopy of one page of Schedule C which contained a description of air navigational site withdrawal # 138, which is located at Ninilchik, Alaska. Copies of several public land orders submitted by the State of Alaska show that the E ½ NE ¼ SW ¼ of sec. 34, T. 1 S., R. 14 W., Seward meridian, the land here in dispute, was included within air navigational site withdrawal # 138.

In light of this documentation submitted by the State of Alaska purporting to show a conveyance to the State of the E ½ NE ¼ SW ¼ of sec. 34, T. 1 S., R. 14 W., Seward meridian, this Board, on Aug. 25, 1978, ordered Cook Inlet Region, Inc., Ninilchik Natives Association, Inc., and the Bureau of Land Management to show cause why this land should not be excluded from the Bureau of Land Management decision to convey on the grounds that this land had been previously conveyed to the State of Alaska, and is not public land within the meaning of § 3(e) of ANCSA.

More than 30 days have elapsed and neither Cook Inlet Region, Inc., Ninilchik Natives Association, Inc., nor the Bureau of Land Management have shown cause why the E ½ NE ¼ SW ¼ of sec. 34, T. 1 S., R. 14 W., Seward meridian, should not be excluded from the conveyance to the Ninilchik Natives Association, Inc. and Cook Inlet Region, Inc.

[1] An issue in an appeal will be dismissed for lack of diligent prosecution when a party fails to respond to an Order of this Board requiring a showing of cause why an issue should not be dismissed.

The State of Alaska having submitted documentation which indicates that they are the fee title holders of the Ninilchik Highway Maintenance site, and Ninilchik Natives Association, Inc., Cook Inlet Region, Inc., and the Bureau of Land Management having failed

to respond to this Board's Order to Show Cause why the Ninilchik Highway Maintenance site should not be excluded from the above-referenced decision to convey on the grounds that this land has been previously conveyed to the State of Alaska and is therefore not public land within the meaning of § 3(e) of ANCSA and not available for conveyance to the Ninilchik Natives Association, Inc., pursuant to ANCSA, this Board Orders that this question be dismissed as an issue in this appeal. This Board further Orders that the E ½ NE ¼ SW ¼ of sec. 34, T. 1 S., R. 14 W., Seward meridian, more commonly known as Ninilchik Highway Maintenance site, shall be excluded from the above-referenced decision to convey.

The only issue remaining in this appeal is the allegation that the Bureau of Land Management erred in its treatment of third-party leases held under A.S. 38.05.077 when it made the conveyance subject to these leases rather than excluding the leases from the conveyance. This very issue was addressed by the Secretary of the Interior on Nov. 27, 1978, when there was published in the *Federal Register* S.O. 3029 (43 FR 55287), the subject of which was "Valid Existing Rights Under the Alaska Native Claims Settlement Act (ANCSA)." This Secretarial Order No. 3029 became effective immediately, canceling previously issued S.O. 3016 which concerned the same subject S.O. 3029 stated in part as follows:

* * * * *

Sec. 2 *Policy.* By this Order I hereby adopt the Memorandum from the Solicitor, dated Oct. 24, 1978, (copy attached), as the position of the Department on the subject of valid existing rights under ANCSA. I reaffirm my conclusion in Order 3016 that, if prior to the passage of ANCSA, lands which were tentatively approved for selection by the State of Alaska were (a) tentatively approved or patented by the State to municipalities or boroughs; or (b) patented or leased by the State with an option to buy under Alaska Statue [sic] 38.05.077 (the so-called 'open-to-entry' program); then valid existing rights were created within the meaning of ANCSA. I also now conclude that lands covered by such open-to-entry leases from the State should not be included in conveyances to Native corporations. The Bureau of Land Management should identify third party interests created by the State, as reflected by the land record of the State of Alaska, Division of Lands, and serve notice on all parties of each other's possible interests, but this Department should not adjudicate these interests. This Order is not intended to disturb any administrative determination contained in a final decision previously rendered by any duly authorized Departmental official. The question of retroactive application of this Order shall be addressed by the Solicitor under procedures which shall be announced by him within 30 days of this Order's effective date.

* * * * *

On Dec. 4, 1978, this Board ended the suspension of action on this issue in this appeal and directed the parties to file within 30 days from receipt of the Order, briefing on this Secretarial Order. More than 30 days have elapsed since receipt of this Order by all parties to this appeal and no briefing has been filed.

[2] The Board has previously held that it is bound by the rules

and regulations promulgated by the Secretary of the Interior under ANCSA. (*Appeal of Eyak Corp.*, 1 ANCAB 132, 83 I.D. 484 (1976).) The Board has also held that it is bound by Secretarial findings, conclusions, and statements of Departmental policy where the Secretary, pursuant to regulation, takes original jurisdiction of a case and renders a final decision. (*Appeal of Clifford C. Burglin*, 2 ANCAB 134 (Aug. 5, 1977); *Appeal of Clifford C. Burglin* (On Reconsideration), 3 ANCAB 37 (July 3, 1978).) Likewise, the Board is bound by statements of Secretarial policy contained in Secretarial Orders published in the *Federal Register*.

[3] One of the statements of policy in S.O. 3029 is that such Order was not intended to disturb any final Departmental decision previously rendered. In the present case, the Bureau of Land Management rendered a decision on the selection application of Ninilchik and this was timely appealed to this Board. Pursuant to 43 CFR Part 4, Subpart A, § 4.1(5) and 43 CFR Part 4, Subpart J, § 4.901(a), this Board decides finally for the Secretary, appeals under ANCSA. This Board, having not rendered a final decision on the issue of treatment of the open-to-entry leases involved in this appeal prior to the issuance of S.O. 3029, now finds that there has been no final administrative determination of the third-party interests here under appeal as mentioned in the fifth sentence of sec. 2 of S.O. 3029 that would preempt the Secretarial policy set forth in sec. 2 of S.O. 3029.

The decision from which this appeal was filed identified certain third-party interests created by the State pursuant to A.S. 38.05.077 on land which formerly had tentative approval for selection by the State but which was determined by the Bureau of Land Management to be properly selected by Ninilchik Natives Association, Inc., under ANCSA. The BLM decision did not adjudicate such third-party interests but identified and treated them as follows:

* * * * *

The grant of lands shall be subject to:

* * * * *

5. The following third-party interests, if valid, created and identified by the State of Alaska, as provided by sec. 14 (g) of the Alaska Native Claims Settlement Act of Dec. 18, 1971 (85 Stat. 688, 704; 43 U.S.C. 1601, 1613(g) (Supp. V, 1975)):

a. Open-to-entry leases, including the right of the lessee to exercise the option to purchase the surface estate at a negotiated price under the provisions of A.S. 38.05.77 [sic]:

1. ADL 41028 located in the NW¼ NE¼ of sec. 30, T. 2 S., R. 12 W., Seward Meridan.

2. ADL 41072 located in the NW¼ SW¼ of sec. 20, T. 2 S., R. 12 W., Seward Meridian.

3. ADL 41073 located in the NW¼ SW¼ of sec. 20, T. 2 S., R. 12 W., Seward Meridian.

4. ADL 41074 located in the NW¼ SW¼ of sec. 20, T. 2 S., R. 12 W., Seward Meridian.

5. ADL 41140 located in the NE¼ SW¼ of sec. 20, T. 2 S., R. 12 W., Seward Meridian.

6. ADL 41146 located in the NW¼ NE¼ of sec. 30, T. 2 S., R. 12 W., Seward Meridian.

7. ADL 44803 located in the SW¼ SW¼ of sec. 24, T. 2 S., R. 13 W., Seward Meridian.

8. ADL 47755 located in the NE¼ SW¼ of sec. 20, T. 2 S., R. 12 W., Seward Meridian.

9. ADL 49086 located in the NE¼ SE¼ of sec. 19, T. 2 S., R. 12 W., Seward Meridian.

10. ADL 52829 located in the NW¼ SW¼ of sec. 20, T. 2 S., R. 12 W., Seward Meridian.

11. ADL 53837 located in the SW¼ SE¼ of sec. 20, T. 2 S., R. 12 W., Seward Meridian.

12. ADL 53838 located in the SE¼ SE¼ of sec. 20, T. 2 S., R. 13 W., Seward Meridian.

13. ADL 55257 located in the NW¼ SE¼ of sec. 20, T. 2 S., R. 12 W., Seward Meridian.

14. ADL 56033 located in the SE¼ SE¼ of sec. 19 and the NE¼ NE¼ of sec. 30, T. 2 S., R. 12 W., Seward Meridian.

* * * * *

The record before this Board indicates that the language of all of the above open-to-entry leases states that they were entered into prior to Dec. 18, 1971, the date of passage of ANCSA.

Pursuant to the policy of the Department of the Interior as set forth in S.O. 3029 and the Memorandum of the Solicitor adopted by S.O. 3029 as the policy of the Department, this Board finds that the above-mentioned open-to-entry leases identified in the Bureau of Land Management decision here under appeal, must be excluded from the conveyance to Ninilchik Natives Association, Inc.

Based upon the above, this appeal is hereby remanded to the Bureau of Land Management, and the Bureau of Land Management is Ordered as follows:

1. To exclude from the conveyance to Ninilchik Natives Association, Inc., those open-to-entry leases identified in the decision to convey;

2. To exclude from the conveyance to Ninilchik Natives Association, Inc., the E½ NE¼ SW¼ of sec. 34, T. 1 S., R. 14 W., Seward meridian, also known as the Ninilchik Highway Maintenance site;

3. To include in the conveyance to Ninilchik Natives Association, Inc., an easement for a road which lies in the S ½ N ½ of sec. 29, T. 4 S., R. 14 W., Seward meridian, which is in existence and which provides access to lands patented to the State of Alaska.

This represents a unanimous decision of the Board.

JUDITH M. BRADY,
Chairperson, Alaska Native Claims Appeal Board.

ABIGAIL F. DUNNING,
Board Member.

LAWRENCE MATSON,
Board Member.